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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBBY CLARDY, as Executrix of the Estate of Eugene Clardy, deceased, and CLARDY REALTY, INC., *Petitioners*,

v.

MARTHA HOFFMAN SANDERS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Of Counsel:

MICHAEL B. BEERS
BEERS, ANDERSON, JACKSON & SMITH, P.C.
272 Commerce Street
Montgomery, AL 36104

JULIAN P. HARDY
PRITCHARD, MCCALL & JONES
1700 Financial Center
Birmingham, AL 35203

DEBORAH ALLEY SMITH
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

KARON O. BOWDRE
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

Attorneys for Petitioners

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

Unrestrained by any legislatively established limit on the amount of punishment it could inflict, the jury in this case imposed jointly on petitioners and another defendant not before this Court, and the Supreme Court of Alabama affirmed, a punitive damage award of $2,750,000 in connection with the wrongful death of respondent's daughter in an automobile accident in which petitioner Debby Clardy's husband also died. This case presents the following questions to this Court:

1. Whether the Due Process Clause of the Fourteenth Amendment acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit and, if it does, what due process restrictions on the otherwise unfettered discretion of juries to inflict punitive damages are required by that Clause.

2. Whether the Due Process Clause of the Fourteenth Amendment precludes the imposition of a single punishment on multiple defendants for a single instance of wrongful conduct without regard to their relative culpability.*

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* All the parties to this case in the court below are named in the caption. Petitioner Clardy Realty, Inc. has no parent, nonwholly owned subsidiary or affiliate.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

In *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986), the Court announced that the question whether the "lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment" raises an "important issue[] which, in an appropriate setting, must be resolved. . . ." Less than three months ago, the Court (and individual Justices) reiterated the proposition that defendants in civil actions brought by private plaintiffs may not be subjected to punishment in and by the courts of a State in the absence of due process, but left to another day the question whether the Due Process Clause restricts jury discretion to award unlimited punitive damages in the absence of legislatively im-

posed restraints. *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989). This case presents the Court with the opportunity to decide what protections the Constitution affords to civil litigants exposed to unlimited, state-imposed, jury-assessed monetary punishments in the form of punitive damages and to do so on a record fully developed on this question in the trial court and the Supreme Court of Alabama. This case also presents the question whether the practice of imposing punitive damages on multiple defendants jointly and severally—a practice characterized as unjust by this Court almost a century ago but one to which the court below and those of several other States still cling—comports with the Due Process Clause.

That the Court should resolve these questions in a case from the courts of Alabama is particularly appropriate in that the Alabama legislature has, only recently, deliberately chosen not to place any limit on the amount of punitive damages that may be inflicted in certain classes of cases, including cases like the case at bar, and because the Supreme Court of Alabama has, very recently, asserted that in some cases Alabama juries should be and are free to impose punitive damages in sums that will literally destroy a defendant.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Alabama affirming the judgment of the trial court and expressly rejecting petitioners' federal constitutional challenges to the $2,750,000 punitive damage award is unreported and is reproduced in App. A, 1a-13a. The September 8, 1989 order of that court denying petitioners'

Application for Rehearing is unreported and is reproduced in App. B, 14a.[1] The opinion of the trial court denying petitioners' post-trial motions is unreported and is reproduced in App. C, 15a-16a.

JURISDICTION

The June 23, 1989 decision of the court below expressly rejected petitioners' Due Process Clause challenges to the punitive damage award. That court denied petitioners' Application for Rehearing on September 8, 1989. This Petition is being filed within ninety days of the denial of that Application. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> [N]or shall any State deprive any person of . . . property, without due process of law. . . .

2. *Ala. Code* § 6-5-391 (1975) provides, in pertinent part:

> When the death of a minor child is caused by the wrongful act, omission or negligence of any person,. . . the mother. . . may commence an action, and in any case shall recover such damages as the jury may assess. . . .

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[1] On September 11, 1989, petitioners applied to Kennedy, Circuit Justice, for a stay of the judgment. No order had been issued in connection with that application as of the date of the filing of this Petition.

STATEMENT OF THE CASE

A. Statement of the Facts

This case arose out of a vehicular accident that occurred on August 30, 1986. In that accident, the drivers of the two vehicles directly involved—Eugene Clardy, the husband of petitioner Debby Clardy, and Norma Hoffman, the minor daughter of respondent—were killed. Respondent brought suit against petitioners[2] under *Ala. Code* § 6-5-391, which authorizes suits to recover for wrongful death. This statute has been authoritatively construed by the court below to permit recovery of only punitive, not compensatory, damages.

At trial, it was established that Mr. Clardy had a blood alcohol level of .21% at the time of the accident, that he had been racing with another vehicle driven by defendant James C. Kervin at approximately 80 m.p.h., and that Mr. Clardy's vehicle was in Norma Hoffman's lane when it struck her vehicle head-on. The jury returned a punitive damage verdict of $2,750,000 which, under existing Alabama law, constituted a single verdict for which all three defendants found liable—Mr. Clardy's estate, Clardy Realty, Inc., and James C. Kervin—are jointly and severally liable. Mr. Kervin filed no post-trial motion and took no appeal from that verdict.

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[2] Also named as defendants in the original complaint and an amended complaint respectively were the driver of a third vehicle involved in the accident, James C. Kervin, and his father, John H. Kervin. The father was named in an amended complaint as a defendant on the theory that he had negligently entrusted a vehicle to his son. The jury found in favor of the father. Petitioner Clardy Realty, Inc., was also added as a defendant in that amended complaint.

B. Decision and Presentation of the Federal Questions

1. *Decision of the Federal Questions*

In a section of its opinion entitled "Constitutional Grounds," the court below found "no constitutional basis for reversal" of the punitive damage award at issue. This summary rejection of petitioners' federal (and state) constitutional challenges to the punitive damage award was followed by citations to two recent opinions of that court issued in *Industrial Chemical & Fiberglass Corp.* v. *Chandler*, Nos. 86-381, -385 (Ala. June 23, 1989) (on rehearing), and *Central Alabama Electric Cooperative* v. *Tapley*, No. 87-1188 (Ala. May 12, 1989). (Those opinions are unreported and are reproduced in App. D, 17a-31a, and App. E, 32a-58a, respectively.)

In *Industrial Chemical*, the court below noted that it had rejected Industrial Chemical's Eighth Amendment challenge to the two $2,500,000 punitive damage awards at issue in that wrongful death case in a prior opinion, App. D, 18a, and went on to reject Industrial Chemical's argument "that the lack of standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death statute violate[s] . . . the Due Process Clause of the Fourteenth Amendment to the United States Constitution." App. D, 18a. The court below explained its conclusion as follows:

> If the existence of malice, wantonness, or negligence is supported as fact by evidence in the record, "we must see no offense to the Constitution, and no deprivation of any constitutional right of [the defendant] in committing the assessment of such damages, *in-*

> *cluding the amount to be allowed,* to the sound discretion of the jury."

App. D, 24a, *quoting Toole* v. *Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 719, 60 Cal. Rptr. 398 (1967) (emphasis added). The court below went on to express substantial doubt that any specific limit could be placed on the amount of punitive damages the jury might award without violating the right to a jury trial guaranteed by Alabama's constitution. App. D, 24a-25a & n.2.[3]

According to the court below in its *Industrial Chemical* decision, the only "process" due to defendants against whom punitive damages may be or have been assessed is the opportunity to challenge the excessiveness of such awards on common law grounds post-trial or on appeal:

> In sum, "fundamental fairness" requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonable, disproportionate, or economically destructive. . . .

App. D, 28a-29a. In describing this "process," the court below left no doubt that Alabama juries continue to be the final arbiters of punitive damages in that State, reaffirming its view expressed in its initial opinion issued in *Industrial Chemical* that the Ala-

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[3] As discussed *infra*, this reasoning of the court below suggests that it would hold unconstitutional any limit that might be prescribed by the Alabama legislature on the amount of punitive damages that a jury might award in any particular type of case in which punitive damages are recoverable.

bama punitive damage system is *ad hoc* and subjective, stating that:

> "a trial court may not conditionally reduce a jury verdict merely because it believes the verdict overcompensates the plaintiff; that a trial court may not substitute its judgment for that of the jury; *and that there can be no ironclad rule in considering the adequacy or excessiveness of a verdict. Each case must be determined by its own facts and on its own merits.*"

App. D, 29a (quoting initial opinion; emphasis added on rehearing).

In *Central Alabama*, the court below had rejected the argument, which it characterized as invoking "substantive due process," that punitive damages could not be awarded in the absence of "objective criteria" to guide the jury. App. E, 38a. In doing so, that court stated its view that in cases "involving the most egregious conduct, juries *should be entitled to punish defendants* so severely as *to destroy them*; justice demands that." App. E, 41a-42a (emphasis added).

The decision by the court below of petitioners' challenges to the punitive damage award under the Due Process Clause of the Fourteenth Amendment, both directly and by incorporation of its recent decisions in *Industrial Chemical* and *Central Alabama*, leaves no doubt that the court below regarded petitioners' federal challenges as properly presented and that it decided them on the merits. As petitioners demonstrate *infra*, there is also in this case a fully developed record in both the trial court and the court below

upon which this Court can address these important due process questions.[4]

2. *The Record on Which the Federal Questions Were Decided Below*

In *Browning-Ferris*, the Court expressed reservations regarding the exercise of its discretionary jurisdiction to decide the constitutionality under the Due Process Clause of a punitive damage award "in the absence of a record on the due process point developed in the [trial and appellate courts]." 109 S. Ct., at 2921 n.23. Such a record fully exists in this case.[5]

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[4] Because no question similar to petitioners' due process challenge to the imposition on them of joint and several liability for a single punitive damage award was involved in either *Industrial Chemical* or *Central Alabama*, it is apparent that the court below did not believe that distinct federal question to be worthy of any additional comment. That issue was, however, necessarily decided by the court below in its broad rejection of all of petitioners' federal constitutional challenges to the punitive damage award and, as discussed *infra*, was raised contemporaneously with petitioners' other federal challenges at each stage of the proceedings in the trial court and before the court below. *See also* note 22 and accompanying text, *infra*.

[5] At each stage of this litigation, petitioners also challenged the imposition of punitive damages under the Excessive Fines Clause of the Eighth Amendment. Given the apparent breadth of the holding of this Court in *Browning-Ferris* on the merits of the Excessive Fines Clause question, petitioners place primary reliance in this Petition on the Due Process Clause. However, as pointed out in the text *infra* at 17, at least one member of the court below has asserted, and none have apparently contradicted, the proposition that a punitive damage plaintiff in Alabama acts as an "agent of the state" in seeking punitive damages. Thus, the Excessive Fines Clause may be applicable to this case. *See also* note 17 and accompanying text, *infra*.

In their amended answer, petitioners contended "that the imposition of punitive damages against them under Alabama law violates their rights under the due process clauses of the Fourteenth Amendments to the Alabama and United States Constitutions," and that "the imposition of purely punitive damages, jointly and severally, violates their rights under the due process clauses of the Fourteenth Amendments to the Alabama and United States Constitutions." *See* App. F, 59a-60a. At the conclusion of respondent's presentation of her case, petitioners moved for a directed verdict and reiterated the foregoing due process objections to the award of punitive damages. *See* App. G, 61a-65a. These federal and state constitutional due process challenges were renewed in a motion for directed verdict after all of the evidence was in. *See* App. H, 66a-68a. After the verdict, these due process challenges were reiterated in petitioners' post-trial motions and briefs. Petitioners specifically argued, *inter alia*, that: (1) the lack of clear standards governing the imposition of punitive damages in Alabama raised important Due Process Clause questions, citing *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986); (2) subjecting defendants to unlimited punitive damage awards constituted arbitrary and capricious punishment in violation of the Due Process Clause; and (3) indiscriminate imposition of joint and several punitive damage liability without regard to individual culpability violated the Due Process Clause. App. I, 69a-73a.

At the hearing on petitioners' post-trial motions on March 31, 1988, petitioners renewed these challenges orally. App. J, 76a-82a. The trial court observed that petitioners had expressed their constitutional chal-

lenges "from the very first" (App. J, 76a), but indicated that the constitutional challenges were not within its power to resolve: "I don't think that I am in a position to decide that that is unconstitutional." App. J, 76a.[6]

In their opening brief in the court below, petitioners argued, *inter alia*, that their rights under the Due Process Clause of the Fourteenth Amendment "were violated in this case by the authority granted to and exercised by the jury to award punitive damages, to impose a fine to punish and deter, without *any* legislatively determined or judicially articulated clear standards as to whether a fine was warranted or the amount of or limits of any such punishment." App. K, 84a. (The pertinent portions of petitioners' opening brief are reproduced in App. K, 83a-95a.) Respondent joined issue, arguing, *inter alia*, that no such limits could be imposed on the unfettered discretion of juries

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[6] Respondent made no argument to the trial court at any time that petitioners had not raised their federal constitutional challenges in a timely fashion. Respondent did argue to the court below that petitioners' federal challenge was untimely because it was not included in the pre-trial order. That argument was necessarily rejected by the court below in reaching the merits of petitioners' federal constitutional challenges and is patently frivolous under that court's decision in *Stump* v. *Bullock*, 527 So. 2d 708, 709-10 (Ala. 1988) (pre-trial orders effective only when trial judge may allow and disallow amendments to pleadings, including answers, filed subsequent to pre-trial conference). As this Court is fully aware, the Supreme Court of Alabama leaves no doubt when it determines that federal constitutional challenges to punitive damage awards have not been properly presented. *See Alabama Power Co.* v. *Capps*, 519 So. 2d 1328 (Ala.) (federal constitutional challenge to punitive damage award in wrongful death case must be raised prior to verdict), *app. dism'd*, 108 S. Ct. 1723 (1988).

without violating the rights of plaintiffs to a jury trial under the Alabama Constitution and the Seventh Amendment. App. L, 96a-99a. *See* note 3 and accompanying text, *supra*.

Finally, in their Application for Rehearing petitioners brought this Court's decision in *Browning-Ferris* to the attention of the court below and pointed out that at least five Justices of this Court had, in *Browning-Ferris* and *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988), indicated serious constitutional concerns regarding whether the imposition by juries of punitive damage awards in the absence of appropriate standards and legislatively fixed limits is consistent with the Due Process Clause of the Fourteenth Amendment. App. M, 100a-07a. The court below denied rehearing without a court opinion.

In no case yet to come before this Court has the record been as fully developed with respect to attempts by defendants to secure the guarantees of the Due Process Clause of the Fourteenth Amendment in the face of the threat and the actuality of a punitive damage award uncontrolled by any meaningful legislative or judicial restraints. Indeed, petitioners urged these arguments time and again on a trial court that believed that only higher judicial authority could address constitutional challenges to a system of punishment that had been blessed repeatedly by the Supreme Court of Alabama and allowed to go unrestrained by the Alabama legislature.

Petitioners renewed and expanded upon these contentions in the court below, but that court simply concluded that, "we find no constitutional basis for reversal." App. A, 13a. Petitioners could have done

no more to bring to this Court a fully developed record upon which to decide these important questions.

REASONS FOR GRANTING THE WRIT

"Awards of punitive damages are skyrocketing." *Browning-Ferris*, 109 S. Ct., at 2924 (O'Connor, J., concurring in part and dissenting in part). This phenomenon is observable not only in wrongful death cases in Alabama, in which multi-million dollar punitive damage awards are affirmed routinely,[7] but in a broad spectrum of civil litigation in which punitive damages have become available in the last decade. This spectrum includes an insurance "bad faith" punitive damage award of $22,500,000,[8] an award of $30,000,000 in punitive damages for wrongful termination of employees,[9] an award of $10,000,000 in a products liability case[10] and awards of $14,000,000 and $15,000,000 affirmed on appeal in California in 1988 in commercial contract cases.[11] These represent a fractional sample of a phenomenon that is rapidly

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[7] *E.g., Industrial Chemical & Fiberglass Corp.* v. *Chandler*, Nos. 86-381, -385 (Ala. Jan. 16, 1989) (after remand) (affirming two punitive damage awards of $2,500,000 each in wrongful death cases); *Black Belt Wood Co.* v. *Sessions*, 514 So. 2d 1249 (Ala. 1986) ($3,500,000 punitive damage award).

[8] *Republic Insurance Co.* v. *Hires*, No. 19426 (Nev. argued June 21, 1989).

[9] *Brooks* v. *Hilton Casinos, Inc.*, No. CV LV-84-436 LDG (D. Nev. Aug. 30, 1989) (final judgment).

[10] *Ford Motor Co.* v. *Durrill*, 714 S.W.2d 329 (Tex. App. 1986).

[11] *Metromedia, Inc.* v. *April Enterprises, Inc., cert. denied*, 109 S. Ct. 3242 (1989) ($14,000,000 punitive damage award); *Eaton Corp.* v. *The PKL Companies, Inc., cert. denied*, 109 S. Ct. 1933 (1989) ($15,000,000 punitive damage award).

overpowering the civil justice system in the United States and affecting the marketing of products and the cost of doing business throughout the United States.[12]

The size of these and other punitive damage verdicts should, standing alone, be of concern to this Court because there is, as pointed out in *Browning-Ferris*, "authority in [this Court's] opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme. . . ." 109 S. Ct., at 2921. Petitioners' primary submission, however, shall be directed to two virtually universal characteristics of the punitive damage systems in place in Alabama and most jurisdictions that "reveal[] a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Id.*, at 2923 (Brennan, J., concurring).

A. The Court Should Grant Review To Decide the Extent to Which the Due Process Clause of the Fourteenth Amendment Acts as a Check on Undue Jury Discretion To Inflict Punitive Damages in Civil Actions Involving Private Parties

The stark reality of the punitive damage system identified and articulated by Justice Brennan in his concurring opinion in *Browning-Ferris* should be examined within a due process framework that focuses,

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[12] *See Browning-Ferris*, 109 S. Ct., at 2924 (O'Connor, J., concurring in part and dissenting in part); Brief of the Pharmaceutical Manufacturers Ass'n and The American Medical Ass'n as *Amici Curiae*, at 5-23, in *Browning-Ferris; Amicus Curiae* Brief of the United States Chamber of Commerce, *et al.*, 11-13, in *Browning-Ferris*.

at least initially, not on the issue of due process "substantive" limits on these punishments but, rather, on what are more aptly characterized as procedural due process rights which are, or at least should be, guaranteed to any person potentially subject to punishment in any legal system governed by the rule of law.

Consideration of these important questions in this case is particularly appropriate because the Alabama legislature has only recently (June 11, 1987) enacted legislation on the subject of punitive damages that was deliberately made inapplicable to punitive damage awards imposed in wrongful death cases. In that legislation, the Alabama legislature, *inter alia*, placed a limit of $250,000 on punitive damage awards in some types of cases,[13] imposed certain procedural requirements on the trial of punitive damage cases,[14] and instructed appellate courts that no presumption of correctness was to attach to punitive damage awards on appeal.[15]

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[13] Under *Ala. Code* § 6-11-21 (Cum. Supp. 1988), punitive damage awards in other than wrongful death cases may not exceed $250,000 unless (1) a pattern or practice of intentional wrongful conduct is proved; (2) conduct involving "actual malice" is proved; or (3) the conduct at issue constitutes libel, slander or defamation.

[14] Under *Ala. Code* § 6-11-20 (Cum. Supp. 1988), punitive damages may be awarded only on the basis of "clear and convincing" evidence that the defendant "consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."

[15] Under *Ala. Code* § 6-11-24 (Cum. Supp. 1988), appellate courts are told, "On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded."

Because, as indicated above, the court below has suggested in *Central Alabama* that the constitutional right of Alabama plaintiffs to a jury trial might place the validity of these statutory curbs on jury discretion in jeopardy under Alabama's constitution, it is especially important for this Court to announce in this case the limits placed by the federal constitution on the punitive damage system in Alabama. Because, in enacting this recent "tort reform" legislation, the Alabama legislature explicitly exempted wrongful death actions from *all* of its provisions,[16] this case is in any event an appropriate vehicle for resolution of the due process issues it presents. The punitive damage award in this case comes to this Court in light of a *fresh* judgment of the Alabama legislature that, in this and several other classes of cases, there should not be any statutory limit on the jury's discretion. Moreover, as noted above, Alabama's highest court has announced that in some cases it would allow juries "to punish defendants so severely as to destroy them." App. E, 42a.

Petitioners shall argue on the merits that the threshold procedural right violated by the punitive verdict in this case and the system that produced it is the absence of any notice to those subject to the jurisdiction of the Alabama courts regarding the level of punishment that may be imposed for the misconduct involved. If the State of Alabama had sought to collect a criminal fine from Mr. Clardy (had he survived the accident) in an amount to be determined

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[16] *Ala. Code* § 6-11-29 (Cum. Supp. 1988). In addition, under § 6-11-30 (Cum. Supp. 1988), none of the provisions of the 1987 legislation "shall. . . affect the rights of any person if such rights accrued prior to June 11, 1987."

by a jury without any statutory limits, the State's attempt would surely be forbidden by the Due Process Clause. *See United States* v. *Batchelder*, 442 U.S. 114, 123 (1979) ("vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"). In administering punishment in criminal cases, there is simply no credible argument against the principle that the law must "fairly and clearly define. . . the punishment which can be administered." *Berra* v. *United States*, 351 U.S. 131, 139-40 (1956) (Black, J., dissenting).

Likewise had Alabama attempted to impose a civil fine on Mr. Clardy or petitioners, it would appear that these same due process principles would be applicable.[17] Indeed, it seems inconceivable that this Court would uphold a statute enforced by a State that expressly left with a jury or a judge the right, after determining liability on a standard of negligence (as provided by § 6-5-391) or some other subjective standard, to impose a fine solely in their discretion. *See Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966). As this Court stated in *United States* v. *Halper*, 109 S. Ct. 1892 (1989), in applying the Double Jeopardy Clause to the punitive component of an ostensibly "civil" fine, "a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.*, at 1901-02. *See Browning-Ferris*, 109 S. Ct., at 2920 n.21. Under *Halper*, punishment is constitutionally distinct from damages constituting compensation

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[17] Moreover, the excessiveness of any such fine seemingly would be subject to scrutiny under the Eighth Amendment. *See Browning-Ferris*, 109 S. Ct., at 2914, 2916, 2918 & 2920.

and necessarily implicates due process concerns quite discrete from those invoked by purely compensatory damages.

In fact, "punitive damages" is a misnomer. The award is a state-imposed punishment that serves no compensatory function but, rather, serves the State's deterrent objectives. Punitive damages are therefore generically in the class of criminal punishments and civil fines and not akin at all to damages. "Since punitive damages are not to compensate a victim for loss but to punish and deter, *the state alone* is considered the true party plaintiff, and *in seeking punitive damages, a plaintiff is an agent of the state* and not a victim." *Tatum* v. *Schering Corp.*, 523 So. 2d 1042, 1048 (Ala. 1988) (Houston, J., dissenting) (emphasis added). Thus, the same due process standards that apply to criminal and civil fines apply equally to their mis-named cousin.

In addition to depriving petitioners and other defendants in punitive damage cases of their procedural due process right to fair notice of the punishment that may be administered for prohibited conduct, the absence of legislatively established limits or standards puts the essentially legislative task of determining the amount of punishment necessary to fulfill society's goals of retribution and deterrence[18] into the hands of civil juries. Those juries, on an *ad hoc* and purely subjective basis, enact and impose a maximum punishment in each case that comes before them. The court below has made quite clear that under Ala-

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[18] *See Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("views... regarding severity of punishment... are peculiarly questions of legislative policy").

bama's punitive damage system, this task is for the jury to perform. In the view of the Supreme Court of Alabama, due process has nothing to do with the random assessment of enormous and capricious punishments by juries:

> The identical case tried to different juries will likely produce different results, but that does not necessarily smack of a lack of fundamental fairness. That is inherent in the nature of juries, given the imperfection of man and his system of justice. Some discretion must be afforded to juries to assess punitive damages as they see fit.

Central Alabama, App. E, 42a.

Thus, the court below exalts one of the very characteristics of the punitive damage system that renders it incompatible with the Due Process Clause of the Fourteenth Amendment. This Nation chose to implement a system of laws, particularly as regards the infliction of punishment, that minimizes the chances that punishment will be inflicted arbitrarily, capriciously, randomly, unpredictably, unequally or excessively. That the punitive damage system crosses all of these constitutional boundaries drawn by the Due Process Clause is obvious; there is virtually no dissent from the proposition that punitive damage awards, as the award in the case at bar, are "frequently based upon the caprice and prejudice of jurors." *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

As stated by Justice O'Connor, the "grant [to a jury] of wholly standardless discretion to determine the severity of punishment appears inconsistent with

due process." *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct., at 1656 (O'Connor, J., concurring in part). Due process demands that juries be confined in their ability to administer punishment by the deliberative judgments of legislatures regarding: (1) the amount of punishment necessary to secure society's interests in retribution and deterrence; and (2) the standards under which the jury is to arrive at an appropriate punishment in a particular case. This question is important, implicates a broad spectrum of civil litigation in which punitive damages are available, and should be decided in this case.

B. The Court Should Grant Review to Decide Whether Holding Multiple Defendants Jointly and Severally Liable for Punitive Damages Regardless of Their Relative Culpability Violates the Due Process Clause of the Fourteenth Amendment

By the time this Court decided *Washington Gas Light Co.* v. *Lansden*, 172 U.S. 534 (1899), the concept of joint and several liability of multiple defendants for compensatory damages in tort actions permeated the common law. *Id.*, at 552. Justice Peckham, in writing for the *Lansden* Court, nevertheless observed that joint liability for punitive damages would not be so easily accepted. Noting that punitive damages are "not a mere matter of compensation" for the plaintiff, *id.*, at 553, he wrote: "While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only." *Id.*[19]

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[19] Although *Lansden* specifically concerned the admissibility of

In the ninety years since *Lansden*, a growing consensus has developed among the States that neither justice nor logic can abide the nonapportionment among defendants of punitive damages. Beginning with the Ohio Supreme Court in 1903, *Mauk* v. *Brundage*, 68 Ohio St. 89, 67 N.E. 152 (1903), and continuing through a 1988 decision of the Vermont Supreme Court, *Coty* v. *Ramsey Assocs., Inc.*, 149 Vt. 451, 546 A.2d 196 (1988), a substantial majority of the States that have considered the question have ruled that defendants should not be held jointly and severally liable for punitive damages.[20] As the Mary-

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evidence establishing the wealth of one of several defendants prior to the assessment of punitive damages and the constitutionality of nonapportionment of punitive damages was not at issue, it represents a clear statement by this Court that rudimentary justice requires that punitive damages, unlike compensatory damages, be tailored to the situation and culpability of each individual *defendant*.

[20] *Rubi* v. *Transamerica Title & Insurance Co.*, 131 Ariz. 403, 641 P.2d 891 (Ct. App. 1981); *Thomson* v. *Catalina*, 205 Cal. 402, 271 P. 198 (1928); *Shields* v. *Martin*, 109 Idaho 132, 706 P.2d 21 (1985); *Louisville & Nashville R.R.* v. *Roth*, 130 Ky. 759, 114 S.W. 264 (1908); *Embrey* v. *Holly*, 293 Md. 128, 442 A.2d 966 (1982); *Nelson* v. *Halvorson*, 117 Minn. 255, 135 N.W. 818 (1912); *State ex rel. Hall* v. *Cook*, 400 S.W.2d 39 (Mo. 1966); *Edquest* v. *Tripp & Dragstedt Co.*, 93 Mont. 446, 19 P.2d 637 (1933) (dictum); *Hotel Riviera, Inc.* v. *Short*, 80 Nev. 505, 396 P.2d 855 (1964); *Sierra Blanca Sales Co.* v. *Newco Industries, Inc.*, 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), *rev'd on other grounds*, 89 N.M. 187, 548 P.2d 865 (1976); *Latasa* v. *Aron*, 59 Misc. 26, 109 N.Y.S. 744 (Sup. Ct. 1908); *McCurdy* v. *Hughes*, 63 N.D. 435, 248 N.W. 512 (1933); *Fredeen* v. *Stride*, 269 Or. 369, 525 P.2d 166 (1974); *Johnson* v. *Atlantic Coast Line R.R. Co.*, 142 S.C. 125, 140 S.E. 443 (1927); *Huckeby* v. *Spangler*, 563 S.W.2d 555 (Tenn. 1978); *St. Louis & South West Ry. Co. of Texas* v. *Thompson*, 102 Tex. 89, 113 S.W. 144 (1908); *Free-*

land Court of Appeals commented after considering the various state court decisions and this Court's opinion in *Lansden*:

> [W]hile a defendant who is least culpable may remain liable for all the compensatory damages suffered by plaintiff, given the purpose of a punitive award, there is no justice in allowing similar recovery of such damages in an action against several defendants based upon evidence of the wealth and blameworthiness of one other than he who must pay the exemplary award. . . . Accordingly, we hold that it is entirely proper to permit a jury to apportion punitive damages among multiple defendants. . . .

Embrey v. *Holly*, 293 Md. 128, 442 A.2d 966, 974 (1982).

Despite the substantial number of States that have joined the consensus recognizing the inherent injustice of joint and several liability for punitive damages, a few States, including Alabama, cling to the view that it is appropriate to impose punitive damages on this basis.[21] The Supreme Court of Alabama, in particular,

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man v. *Sproles*, 204 Va. 353, 131 S.E.2d 410 (1963) (dictum). *See also Remeikis* v. *Boss & Phelps, Inc*, 419 A.2d 986 (D.C. App. 1980). For two courts applying "federal law of damages" in a civil rights context, see *McFadden* v. *Sanchez*, 710 F.2d 907 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983), and *Davidson* v. *Dixon*, 386 F. Supp. 482 (D. Del. 1974), *aff'd*, 529 F.2d 511 (3d Cir. 1975).

[21] *Bell* v. *Riley Bus Lines*, 257 Ala. 120, 57 So. 2d 612 (1952); *Curtis* v. *Partain*, 272 Ark. 400, 614 S.W.2d 617 (1981) (plaintiff who seeks punitive damages against only one of several defendants waives right to claim any punitive damages); *Walker*

has heard extensive argument on the issue, *Tatum* v. *Schering Corp.*, 523 So. 2d 1042, 1043 (Ala. 1988), but has declined to alter its position: "Although highly persuasive arguments can be made that prior cases of this Court were incorrectly decided, this Court has resolutely refused to change the rule of law that punitive damages are not apportionable among joint tortfeasors." *Id.*[22] The *Tatum* court went on to point out that that case represented the second time in as many terms that it had rejected a challenge to the non-apportionment rule. *Id.*, *citing Black Belt Wood Co.* v. *Sessions*, 514 So. 2d 1249 (Ala. 1986). In *Black Belt*, the court below acknowledged that, "[o]f course, apportionment does result in a judgment's being rendered against each defendant individually and splits up damages in proportion to the separate culpability of each defendant, and, as a result, penalties conform more closely to the culpability of the offender. . .," but concluded simply that "Alabama has not followed that rule." 514 So. 2d, at 1263 (citation omitted). Clearly, then, this unjust and unconstitutional rule will only be overturned if this Court grants review

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v. *Bishop*, 169 Ga. App. 236, 312 S.E.2d 349 (1983); *Pardridge* v. *Brady*, 7 Ill. App. 639 (1881); *Sieben* v. *Sieben*, 231 Kan. 372, 646 P.2d 1036 (1982); *Interstate Co.* v. *Garnett*, 154 Miss. 325, 122 So. 373, *sugg. of error overruled*, 154 Miss. 359, 122 So. 756 (1929); *Richette* v. *Solomon*, 410 Pa. 6, 187 A.2d 910 (1963); *Young* v. *Aylesworth*, 35 R.I. 259, 86 A. 555 (1913).

[22] The frequency with which the court below continues to be confronted with this issue notwithstanding its apparently unshakable position may well explain the failure of the court to address the merits of this question expressly in its opinion in this case. *See* note 4, *supra*.

of this question and, after full consideration, directs the court below to abandon this well-entrenched rule.[23]

As this Court has established, the Due Process Clause "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter* v. *Department of Social Services of Durham County*, 452 U.S. 18, 33 (1981). This Court has also made clear that the Due Process Clause protects both plaintiffs and defendants in civil litigation, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), specifically guaranteeing a litigant "the opportunity to present his case and have its merits fairly judged." *Id.*, at 433.

That the nonapportionment rule for punitive damages violates the Due Process Clause and deserves to be stricken down is almost self-evident. As one of the three dissenters in *Tatum* noted:

> A recovery of punitive damages by execution from a defendant who does not deserve the penalty or who deserves a lesser penalty based upon his or her fault, while others who are truly culpable and deserve the penalty go unpunished raises the spectre of unconstitutionality, *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 1589, 89 L. Ed. 2d 823 (1986), and is not consistent with the policy underlying punitive damages.

523 So. 2d, at 1049 (Houston, J., dissenting).

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[23] "Alabama does not permit contribution among joint tortfeasors. . . . Therefore, in Alabama, the punishment of defendants, when there are more than one, remains where the plaintiff imposes it." *Tatum*, 523 So. 2d, at 1049 (Houston, J., dissenting).

As Justice Houston intimated in dissent in *Tatum*, the nonapportionment rule flies in the face of this Court's standard of fundamental fairness. A punitive damage defendant in Alabama may be exposed to punishment based primarily on the conduct of other persons, and the plaintiff may collect from that defendant rather than a more impecunious or perhaps judgment-proof co-defendant. Certainly it would be unthinkable to require juries or judges in criminal cases to impose a single sentence against multiple defendants and then allow the victim of the crime to designate one defendant to suffer all or most of the punishment in the place of the others. If punishment may not be dispensed in that fashion in criminal cases, it seems obvious that punishment may not be imposed in such a fashion in civil cases. *Cf. United States* v. *Halper, supra.*

This Court has often acknowledged that punitive damages serve to punish defendants: "The Court's cases abound with the recognition of the penal nature of punitive damages." *Browning-Ferris*, 109 S. Ct., at 2932 (O'Connor, J., concurring in part and dissenting in part) (citing eight supporting cases dating from 1893 through 1987). *See also United States* v. *Halper*, 109 S. Ct., at 1901 ("punitive damages. . . serve punitive goals"). In this regard, Alabama is in accord with this Court and with the other States that allow punitive damages. *See, e.g., Green Oil Co.* v. *Hornsby*, 539 So. 2d 218 (Ala. 1989).

Given the "penal nature" of punitive damages, due process requires that the punishment fit the particular defendant's culpability. It is axiomatic that, "[i]n our jurisprudence, guilt is personal." *Scales* v. *United*

States, 367 U.S. 203, 224 (1961). *See also Korematsu* v. *United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting); *Hirabayashi* v. *United States*, 320 U.S. 81, 107-08 (1943) (Douglas, J., concurring). A corollary to the personal quality of guilt is that punishment be tailored to fit the guilt. As the Court has noted, "[t]he focus [of punitive damages] is on the character of the tortfeasor's conduct." *Smith* v. *Wade*, 461 U.S., at 54.

After considering *Smith* v. *Wade* and surveying the several States' decisions on apportionment of punitive damages, the Second Circuit concluded in a federal civil rights context that, "[t]he degree of appropriate punishment and the extent to which deterrence may be achieved at an individual's expense are *obviously matters appropriate for individualized determination.*" *McFadden* v. *Sanchez*, 710 F.2d 907, 913 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983) (emphasis added). The Due Process Clause of the Fourteenth Amendment compels that same conclusion.

This Court has previously enumerated three factors that aid in identifying the "specific dictates of due process," *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and consideration of them here lends strong support to the need for this Court to review Alabama's nonapportionment rule. These factors are: (1) "the private interest that will be affected" by application of the rule; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of . . . substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the . . . substitute procedural requirement would entail." *Id.* (citation

omitted). Even a cursory review of the impact of the nonapportionment rule reveals serious due process concerns.

The interest affected is deprivation of increasingly breathtaking quantities of property. The risk of an erroneous deprivation is significant and ubiquitous because any one defendant's exposure to punitive damages is left to the whim of the plaintiff and has absolutely no correlation to the defendant's relative culpability. The substitute safeguard of requiring apportionment would, in contrast, ensure that punishment and culpability go hand in hand. While requiring juries to apportion punitive damages would not increase either fiscal or administrative burdens on the State, it would surely enhance rather than diminish achievement of the State's twin goals of punitive damages: retribution and deterrence.[24] Although "due process" "has never been, and perhaps can never be, precisely defined," *Lassiter*, 452 U.S., at 24-25, it certainly would not appear to tolerate a procedure that is neither fair to individual defendants nor conducive to achievement of the asserted state goals.

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[24] As the South Carolina Supreme Court determined long ago:

> The rule of one verdict [for punitive damages] against all the defendants found guilty will almost always cause the entire punishment to fall upon one alone. The other defendants will then be freed and discharged from liability on the judgment, thus being enabled, notwithstanding the "example" of the verdict "for the public good," to wholly evade the penalty and defeat altogether the ends of justice.

Johnson v. *Atlantic Coast Line R.R. Co.*, 142 S.C. 125, 140 S.E. 443, 454-55 (1927).

As documented above, most courts that have considered the issue have determined that "reason and common sense," *Latasa* v. *Aron*, 59 Misc. 26, 109 N.Y.S. 744, 745 (Sup. Ct. 1908), as well as justice, *see, e.g., Thomson* v. *Catalina*, 205 Cal. 402, 271 P. 198, 200 (1928), require apportionment of punitive damages. Alabama and a small minority of other States have not followed this emerging consensus and, absent intervention by this Court, will not do so.

CONCLUSION

This case presents the appropriate vehicle for the Court's resolution of the important constitutional question left for "another day" by *Browning-Ferris*. Since the Court's decision in *Aetna Life Insurance Co.* v. *Lavoie* in April 1986, Alabama has had over three years to address, legislatively and judicially, the fundamental inequities in its punitive damage system. Especially in light of the recent and inadequate responses of Alabama's legislature and judiciary to the concerns that have been expressed repeatedly by this Court, this case should be afforded plenary consideration by the Court.[25]

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[25] *See also Combined Insurance Company of America* v. *Ainsworth*, No. 89-292, *pet. for cert. filed*, August 17, 1989, *stay granted*, June 15, 1989 (A-984).

September 14, 1989

Respectfully submitted,

Of Counsel:

MICHAEL B. BEERS
BEERS, ANDERSON, JACKSON & SMITH, P.C.
272 Commerce Street
Montgomery, AL 36104

JULIAN P. HARDY
PRITCHARD, MCCALL & JONES
1700 Financial Center
Birmingham, AL 35203

DEBORAH ALLEY SMITH
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

KARON O. BOWDRE
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

Attorneys for Petitioners

**Counsel of Record*

APPENDICES

APPENDICES

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APPENDIX A

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1988-89

87-1070

Debby D. Clardy, as executrix of
the estate of Thomas Eugene Clardy, deceased;
and Clardy Realty, Inc.

v.

Martha Hoffmann Sanders

Appeal from Montgomery Circuit Court
(CV-87-448)

JONES, JUSTICE.

This appeal by the defendants, from an adverse judgment based on a jury verdict in a wrongful death case, raises the following issues: Whether the trial court erred 1) in denying Clardy Realty, Inc.'s motion for directed verdict on the grounds of insufficiency of the evidence and the inapplicability of the "successor corporation liability" doctrine; 2) in denying the defendants' constitutional challenge to Alabama's punitive damages award in wrongful death cases; and 3) in rejecting the defendants' post-judgment motion for a remittitur on non-constitutional grounds. We affirm.

Background Facts and Statement of the Case

Thomas Eugene Clardy and James K. Kervin were racing their automobiles late one evening. In an attempt to

pass, Clardy swung into the opposite lane and struck a car being driven in the opposite direction by Norma Hoffmann, a 16-year-old female. Both Clardy and Hoffmann were killed.

Clardy owned a real estate proprietorship called Clardy Realty. Following Clardy's death, Debby Clardy, the widow of Thomas Eugene Clardy, incorporated Clardy Realty. Mrs. Clardy was also named the executrix of her late husband's estate.

Originally, Martha Hoffmann Sanders, Norma's mother, filed a two-count complaint under Ala. Code 1975, § 6-5-391, against Mrs. Clardy, as the executrix of Clardy's estate, and against Kervin, alleging negligence and wantonness. Later, Mrs. Sanders amended her complaint to add as a defendant Clardy Realty, Inc., alleging that Clardy was acting within the scope of his authority at the time of the accident, and to add Kervin's father, under a theory of negligent entrustment. Kervin had received five speeding tickets in a two-year period before the accident, and had also been drinking that night.

The jury returned a verdict in favor of Kervin's father, but against the other defendants in the amount of $2.75 million in punitive damages. Judgment was entered in accordance with the verdict. The trial judge conducted an extensive post-trial evidentiary hearing and issued a "*Hammond* order"[1] setting forth the factors it used in determining that the verdict was not excessive.

The Statement of the Facts

The following facts are undisputed: 1) Clardy had a blood alcohol level of .21% at the time of the accident; 2) Clardy was racing his truck with the car driven by Kervin; 3) Clardy was driving approximately 80 mph; and

[1] See *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).

4) Clardy was in Hoffman's lane when he struck her car head-on.

Other facts (taken from the evidence as viewed in a light most favorable to the plaintiff) are as follows: Clardy left his house at about 11:00 P.M. on the night of the accident. There is a dispute over where he was going, but there was testimony to the effect that he was going to check on some of his rental property. A "Clardy Realty" sign was in Clardy's truck at the time of the accident, and the accident occurred near some property owned by Clardy. As previously stated, all of the testimony, which included that of several eye-witnesses, showed that the accident was entirely the combined and concurring fault of Clardy and Kervin. The accident occurred between 1:00 and 1:30 A.M. on August 30, 1986.

On October 17, 1986, Mrs. Clardy incorporated her husband's business under the name Clardy Realty, Inc. She testified that she did so on the advice of her accountant and lawyer, and not in response to the litigation arising from the accident. According to Mrs. Clardy, the assets and liabilities of Clardy Realty were assumed by Clardy Realty, Inc. No consideration passed between the estate of Clardy and Clardy Realty, Inc. The location, manner of operation, and personnel of Clardy Realty remained the same following the incorporation. The only major change that occurred was Mrs. Clardy's becoming the licensed broker for the corporation, the position her husband had held in the proprietorship.

I. The Insufficiency-of-the-Evidence Issue

Under Clardy Realty, Inc.'s first allegation of error, it poses the following propositions: "A. Speculative evidence cannot support the verdict against Clardy Realty, Inc.; B. Theories of successor corporation liability are not applicable to impose liability on Clardy Realty, Inc.; and C. The trial court's erroneous charge to the jury concerning the presumption of agency by the owner of the vehicle con-

stitutes reversible error."[2] As a premise for its "insufficiency" argument, Clardy Realty, Inc., contends that the plaintiff failed to meet her burden of making a prima facie showing that Clardy was on business for the proprietorship at the time of the accident. This argument misperceives the relationship between Clardy as an individual, and Clardy as the sole proprietor of Clardy Realty. Whether Clardy, at the time of the accident, was on business for Clardy Realty is of no legal consequence as to the liability of either Clardy's estate or Clardy Realty, Inc., under the successor liability doctrine. Clardy the individual and Clardy Realty, a sole proprietorship, are but a single legal entity; and the two separate capacities (Clardy as an individual, and Clardy as a sole proprietor) can not be separated into two legal entities for the purpose of testing Clardy Realty, Inc.'s liability as a successor in interest to the liabilities of Clardy's estate.

II. The Successor Liability Issue

The failure of Clardy Realty, Inc.'s *respondeat superior* argument, however, does not answer the ultimate question concerning the application of the "successor corporation liability" theory. Under this prong of its argument, Clardy Realty, Inc., contends that it could not legally succeed to the debts and obligations of Clardy Realty, because the proprietorship ceased to exist upon Clardy's death and before Clardy Realty, Inc., came into existence; and, further, that the plaintiff did not seek to *substitute* Clardy Realty, Inc., for Clardy's estate, but sued Clardy Realty, Inc., as an *additional* defendant, thus impermissibly enhancing the plaintiff's award of punitive damages.

Clardy Realty, Inc.'s first contention is to the effect that there could be no continuity of operations due to the

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[2] Because the issue concerning the trial court's jury instruction on the presumption of agency was not preserved for review pursuant to Rule 51, A.R.Civ.P., we will not address this allegation of error.

break in time between Clardy's death and Clardy Realty, Inc.'s legal existence. This argument fails, both factually and legally. Factually, the time span between Clardy's death and Clardy Realty, Inc.'s incorporation was far too brief to allow any appreciable change in the business operations of the firm; and the evidence of record does not support a finding of any material change in the firm's operation. Legally, the test of the doctrine's application is not so tenuous or restrictive as to depend exclusively upon the "continuity of operations" element.

The requisite alternative elements of the "successor corporation liability" theory are stated in *Andrews v. John E. Smith's Sons Co.*, 369 So.2d 781 (Ala. 1979):

> "As a general rule, where one company sells or otherwise transfers all its assets to another company, the transferee is not liable for the debts and liabilities of the transferor unless (1) there is an express agreement to assume the obligations of the transferor, (2) the transaction amounts to a *de facto* merger or consolidation of the two companies, (3) the transaction is a fraudulent attempt to escape liability, or (4) the transferee corporation is a mere continuation of the transferor. 15 Fletcher, *Cyclopedia Corporations* § 7122 (Perm. ed. 1973); 19 Am. Jur. 2d § 1546."

369 So.2d at 785. Under appropriate instructions, and the facts disclosed of record, the jury was authorized to conclude that one or more of these elements was present, and, thus, that Clardy Realty, Inc., succeeded to the liabilities of Clardy Realty.

The second aspect of Clardy Realty, Inc.'s argument (the recovery against both the estate and Clardy Realty, Inc.) is more difficult of resolution, and, indeed, contains a ring of logic. Ordinarily, the application of the "successor liability doctrine" does not contemplate that both entities will be held liable for a single obligation arising from a single

culpable act or other legal obligation. To be sure, if the doctrine is held to apply, the successor entity is ordinarily fully chargeable with the liability, but not the predecessor entity.

The parties agree that this issue has not been directly addressed in the Alabama cases. Authorities from other jurisdictions have been cited by the parties and thus consulted by us in our effort to resolve this issue. See *Tift v. Forage King Industries, Inc.*, 108 Wis.2d 72, 322 N.W.2d 14 (1982); *Plaza Express Co. v. Middle State Motor Freight, Inc.*, 40 Ill.App.2d 117, 189 N.E.2d 382, n.4 (1963); *Jones v. Eppler*, 266 P.2d 451, n.9, 10 (Okla. 1953); and *Acorn Lumber Co. v. Friedlander Box Co.*, 240 Ill.App. 425 (1926). Specifically, we adopt the rationales and the holdings of the *Tift* and *Jones* decisions. The *Tift* court held:

> "It should be emphasized that the corporate rule that exempts a successor company from the liabilities of its predecessor when it has purchased the assets of the predecessor is subject to . . . four exceptions . . . .
>
> "Two of these exceptions, the first and the fourth, are unrelated to the problem at hand, for where there is an express or implied assumption of the selling corporation's liabilities—tort, contract, or both—the problem is obviated; and where the transaction is fraudulent, protection is afforded under the law of fraudulent conveyances. The other two 'exceptions' are, however, relevant to our discussion of the purposes and policies behind causes of action for tort. These exceptions are not really exceptions at all, for when applicable they swallow up the rule of nonliability.
>
> "The second exception is that there is liability when the transaction amounts to a consolidation or merger (*de facto* or otherwise) of the purchaser and seller corporations. The third 'exception' ex-

ists when the purchaser corporation is merely a continuation of the seller corporation. When viewed in the context of a tort caused by a defective product, these two 'exceptions' merely recite that, where either one is applicable, there is 'identity,' because in substance the successor business organization which the plaintiff sues is, despite organizational metamorphosis, the same [entity] which caused his injury.

"As [Fletcher, *Cyclopedia Corporations*, Vol. 15, sec. 7122, p. 188,] points out, the rule and its exceptions were designed initially to protect contract or quasi-contract creditors of a dissolved business organization and, hence, as a general group, all four exceptions are irrelevant to tort except as to the extent that the second and third exceptions are indicia of 'identity.' These exceptions are declaratory of tests to be applied to encourage 'piercing the corporate veil' and to look to the substance and effect of business transformations or reorganizations to determine whether the original organization continues to have life or identity in a subsequent and existing business organization.

"They can be viewed also as tests for 'privity' with the subsequent organization even if the dealings were only between the original business organization and the ultimate consumer or the party injured.

"Exceptions two and three to the corporate rule demonstrate that, when it is the same business organization that one is dealing with, whether it be by consolidation, merger, or continuation, liability may be enforced. These are tests of 'identity.' Suit is possible in these circumstances, because there would be privity with

the actual seller or manufacturer, *i.e.*, the exceptions are guidelines to determine under what circumstances the original entity continues to exist, albeit in an altered form.

"By applying these rules of corporate law, it is apparent, either by application of exception two or three that the present corporation is the same as the prior organization, *i.e.*, it has substantially the same identity although transformed by merger, consolidation, etc. Hence, an injured party who dealt with the predecessor organization could sue the successor. Where a defendant has retained the same identity, though perhaps not the same name or form of organization, the element of privity is satisfied.

"If there is business succession, then in effect the plaintiff is suing the 'same' business that [committed] the original [culpable conduct]. Under such a state of facts, a novel or unusual problem is not presented. A court merely need determine that the defendant, despite business transformations, is substantially the same as the original [entity]. This is the application of existing corporate law; and such law governs the decision in this case, because it is clear that there is identity between the original [entity] and the present [entity].

"It should be emphasized, however, that the possible fixing of liability on the [successor entity] does not necessarily exonerate the [predecessor entity]. The present organization may well have the right of indemnity. What is important, however, is that the plaintiff may seek recourse against either. Where the burden of payment eventually falls [as] between an existing organization . . . and [the present] organization that is

a continuation of the former ought not to be a concern of an injured plaintiff."

108 Wis.2d at 77-80, 322 N.W.2d at 16-17.

The *Jones* court wrote:

"It is urged that the judgment against the defendant, L. C. Jones Trucking Company, a corporation, is void for the reason that the corporation was not in existence at the time of plaintiff's injuries. The record discloses that the corporate defendant was organized and incorporated October 9, 1948; that the accident occurred on June 14, 1948; that the corporation took over the individual business and all the assets of L. C. Jones d/b/a L. C. Jones Trucking Co., without consideration other than corporate stock issued to the individuals, including the use of the franchises or motor carrier permits formerly issued to L. C. Jones, individually, and the defendant L. C. Jones Trucking Company, a corporation, operated under them, and by an added endorsement on its policy, the public liability insurance carrier became the insurance carrier of the successor corporation; that all the assets of the new corporation were derived from the old L. C. Jones Trucking Company and that the new corporation remained under the same management; that the corporate president and manager is L. C. Jones, former owner of the old L. C. Jones Trucking Company; that, in fact, the business was continued in the same manner as before the incorporation and the new corporation was merely a continuation of its predecessor. However, it is contended, by the defendants, that we are not dealing with the merger of corporations, but are concerned with a case wherein an individual was engaged in the trucking business; that later the

individual and others organized a corporation to conduct the same business; that under these circumstances the corporation does not become liable for an unliquidated tort arising before the corporation was organized. Citing Burkholder v. Okmulgee Coal Co., 82 Okl. 80, 196 P.2d 679 and other cases of similar import in support of this contention.

"We disagree. The mere fact that a corporation is organized to take over a business formerly conducted by a firm or individual is not of itself sufficient to render it liable for a debt incurred by such firm or individual in conducting such business. But where, as in the instant case, it appears that the property is simply transferred to the corporation without consideration other than corporate stock issued to the individuals and the business is but a continuation of the old and is conducted as before, under the same name and management, the corporation, so formed and operated, will be liable for the existing debts of the unincorporated entity, as it will be presumed that such debts were assumed. 13 Am.Jur., Corporations, Secs. 1248 and 1249. St. Clair Lime Co. v. Ada Lime Co., 196 Okl. 29, 162 P.2d 547; S. & J. Supply Co. v. Warren, 191 Okl. 683, 133 P.2d 201; Oklahoma Title Co. v. Burrus, 172 Okl. 94, 44 P.2d 852, 853, and cases cited therein; Fletcher on Corporations, Vol. 8, Sec. 4014; Thompson on Corporations, 4th Ed., Vol. 4, Sec. 2436 et seq.

"While we have passed upon the question of assumption of debts (see above cases) this is the first occasion for determining such corporation entity's liability for torts of its predecessor. A tort liability of an individual, partnership or corporation is an indebtedness which may be en-

> forced against a corporation which takes over the business and assets of its predecessor under the circumstances outlined above, as the assumption of the liabilities of a predecessor includes tort liabilities. 13 Am.Jur., Corporations, Sec. 1253; Barnes v. Liebig, 146 Fla. 219, 1 So.2d 247."

266 P.2d at 457-58.

Here, the facts, when tested against the rationales of *Tift* and *Jones*, defy any conclusion save one: that Clardy Realty, Inc., became the successor corporation to the interests and liabilities of Clardy Realty, a sole proprietorship.

III. The Damages Issue

A. Constitutional Grounds

The trial court entered the following supplementary order denying the defendants' post-judgment motions:

"ORDER

> "This court having previously conducted a 'Hammond' hearing on March 31, 1988, and having previously entered its ORDER denying the post-trial motion filed by Defendants Clardy Realty, Inc., and Debby D. Clardy, Executrix of the Estate of Thomas Eugene Clardy, now states for the record the factors considered in denying said Motion pursuant to *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).
>
> "This court has considered the combined culpability of the Defendants, the desirability of discouraging others from similar conduct, the impact of the judgment on the parties and innocent third persons, and has also considered the necessity of preventing unnecessary homicides, especially in cases where the facts and circumstances are similar to those that took the life of Norma Hoffmann and Thomas Eugene Clardy.

"Even though the award of 2.75 million dollars for the Plaintiff is a large sum of money, it is not excessive as a matter of law. The Alabama Supreme Court has recently upheld an award of 3.5 million dollars in a wrongful death action where the combined culpability of the defendants appears to have been less than in the instant case. *Blackbelt Wood Co. v. Sessions*, 514 So.2d 1249 (Ala. 1986).

"The jury's verdict is clothed with constitutional protection, as set forth in Article I, Section 11, *Constitution of 1901*. Unless the verdict is flawed, thereby losing its constitutional protection, this court has no authority to interfere with the jury's verdict. There was no evidence that the verdict in this case was based on bias, passion, prejudice, corruption or other improper motive. The jury was composed of male and female, black and white, young and elderly. The jurors acted responsibly and conscientiously throughout a well-tried case. This court had the opportunity to observe the parties, their counsel, a significant number of witnesses, and a substantial number of documents, including photographs, maps, and a [video tape] of the scene. The court also had the opportunity to observe the reaction of the jurors to the evidence and to the court's instructions. The jury's verdict for 2.75 million dollars was consistent with the evidence and the court's instructions, and, after due consideration, the motion of the Defendants was previously DENIED the 11th day of May, 1988.

"Dated this the 13th day of May, 1988.

"/s/ _____
"JAMES T. GULLAGE
"Circuit Court"

After reviewing the trial court's *Hammond* order and the arguments of counsel, we find no constitutional basis for reversal. See *Industrial Chemical & Fiberglass Corp. v. Chandler*, [Ms. 86-381, -385, June 23, 1989] ___ So.2d ___ (Ala. 1989) (on rehearing); and *Central Alabama Electric Cooperative v. Tapley*, [Ms. 87-1188, May 12, 1989] ___ So.2d ___ (Ala. 1989).

B. Non-Constitutional Grounds

We have carefully reviewed the entire record and considered the gravity of the wrong in light of the trial judge's post-judgment findings and conclusions, as well as other judgments affirmed by this Court in wrongful death cases, and we find no basis for reversal on non-constitutional grounds. See *Alabama Power Co. v. Capps*, 519 So.2d 1328 (Ala. 1988), appeal dismissed, ___ U.S. ___, 108 S.Ct. 1723 (1988); *Black Belt Wood Co. v. Sessions*, 514 So.2d 1249 (Ala. 1986); *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986), appeal dismissed, ___ U.S. ___, 108 S.Ct. 2008 (1988); *General Motors Corp. v. Edwards*, 482 So.2d 1176 (Ala. 1985); *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657 (Ala. 1985); and *National Security Fire & Casualty Co. v. Bowen*, 447 So.2d 133 (Ala. 1983).

AFFIRMED.

Almon, Shores, and Adams, JJ., concur.

Maddox, J., concurs as to parts II and III, and concurs in the result as to part I.

Houston, J., concurs as to part I, and concurs in the result as to parts II and III.

APPENDIX B

87-1070 - *Clardy v. Sanders*

On Application for Rehearing

JONES, JUSTICE.

APPLICATION OVERRULED.

Almon, Shores, and Adams, JJ., concur.

Maddox, and Houston, JJ., concur specially.

MADDOX, JUSTICE (Concurring specially).

I agree that the defendants' application for rehearing should be overruled. I am writing specially to point out that punitive damages in a wrongful death case, such as the case here, are different in nature from punitive damages in any other type of tort action in Alabama. The defendants' constitutional arguments concerning this punitive damages award must be considered in a different light than constitutional challenges to punitive damages awards in other tort actions, because in Alabama, only punitive damages are recoverable in a wrongful death action. See my opinion concurring in part and dissenting in part in *Alabama Power Co. v. Cantrell*, 507 So. 2d 1295, 1306 (Ala. 1986), appeal dismissed, ___ U.S. ___, 108 S.Ct. 2008 (1988).

Houston, J., concurs.

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SUPREME COURT OF ALABAMA

APPENDIX C

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NUMBER: CV-87-448

MARTHA HOFFMANN SANDERS,
Mother of NORMA DAVISON HOFFMANN,
deceased minor,

Plaintiff,

vs.

DEBBY D. CLARDY,
in her representative capacity as Executrix of the Estate of Thomas Eugene Clardy; James C. Kervin; John H. Kervin and Clardy Realty, Inc.

Defendants.

ORDER

This Court having previously conducted a "Hammond" hearing on March 31, 1988 and having previously entered its ORDER denying the post-trial Motion filed by Defendants Clardy Realty, Inc. and Debby D. Clardy, Executrix of the Estate of Thomas Eugene Clardy, now states for the record the factors considered in denying said Motion pursuant to *Hammond vs. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).

This Court has considered the combined culpability of the Defendants, the desirability of discouraging others from similar conduct, the impact of the judgment on the parties and innocent third persons and has also considered the necessity of preventing unnecessary homocides, especially in cases where the facts and circumstances are similar to

those that took the life of Norma Hoffmann and Thomas Eugene Clardy.

Even though the award of 2.75 million dollars for the Plaintiff is a large sum of money, it is not excessive as a matter of law. The Alabama Supreme Court has recently upheld an award of 3.5 million dollars in a wrongful death action where the combined culpability of the defendants appears to have been less than in the instant case. *Blackbelt Wood Company v. Sessions*, 514 So.2d 1249 (Ala. 1986).

The jury's verdict is clothed with constitutional protection, as set forth in Article I, Section 11, *Constitution of 1901*. Unless the verdict is flawed, thereby losing its constitutional protection, this Court has no authority to interfere with the jury's verdict. There was no evidence that the verdict in this case was based on bias, passion, prejudice, corruption or other improper motive. The jury was composed of male and female, white and black, young and elderly. The jurors acted responsibly and conscientiously throughout a well tried case. This Court had the opportunity to observe the parties, their counsel, a significant number of witnesses, and a substantial number of documents, including photographs, maps, and a video film of the accident scene. The Court also had the opportunity to observe the reaction of the jurors to the evidence and to the Court's instructions. The jury's verdict for 2.75 million dollars was consistent with the evidence and the Court's instructions, and, after due consideration, the Motion of the Defendants was previously DENIED the 11th day of May, 1988.

DATED this the 13 day of May, 1988.

/s/ James T. Gullage
JAMES T. GULLAGE
Circuit Judge

APPENDIX D

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1988-89

86-381

Industrial Chemical and Fiberglass Corporation

v.

Lynn B. Chandler, et al.

86-385

Industrial Chemical and Fiberglass Corporation

v.

Peggy Ann Ensley, et al.

Appeals from Jefferson Circuit Court

On Application for Rehearing
and Application for Stay

ADAMS, JUSTICE.

Industrial Chemical and Fiberglass Corporation, a distributor of fiberglass products and supplies, appealed from judgments based upon a jury verdict awarding Lynn B. Chandler and Peggy Ann Ensley $2.5 million each on their claims against Industrial Chemical after their husbands, Terry D. Chandler and Dewey E. Ensley, Jr., were killed by a chemical fire that swept through a cylindrical fiberglass tank in which the men were working.

In our first opinion in this case (September 30, 1989), we held that the punitive damages award against Industrial Chemical did not violate its rights under the Eighth Amendment to the United States Constitution and that Lynn Chandler and Peggy Ann Ensley had capacity to assert claims for Industrial Chemical's breach of implied warranty. Our second opinion (January 16, 1989), after remand for an order required by *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), held that the record did not establish that the awards were excessive as a matter of law, that it was not established or reflected in the record that the verdicts were based upon bias, passion, corruption or other improper motive, and that the compensatory damages awarded for pain and suffering were not excessive.

On rehearing, Industrial Chemical argues (1) that we should stay our decision pending the United States Supreme Court's decision reviewing *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404 (2d Cir.), *cert. granted*, ___ U.S. ___, 109 S.Ct. 527 (1988), argued en banc, April 18, 1989; (2) that our decision contradicts our traditional interpretation of the wrongful death act; (3) that we should reconsider our determination that the punitive damages awarded in these cases are not sufficiently analogous to criminal punishments to warrant application of the Eighth Amendment; and (4) that we failed to address its argument that the lack of standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death statute violated its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

I

Industrial Chemical argues that by granting a stay of the judgments in these cases, "the Court would relieve Industrial Chemical of the unnecessary burden of petition-

ing the Supreme Court for a writ of certiorari on the Eighth Amendment issue" and "similarly, by granting a stay, this Court would relieve the plaintiffs of the unnecessary burden of having to file with the Supreme Court a brief in opposition to the petition." Thus, Industrial Chemical submits that this Court could "save valuable judicial time and resources" by granting a stay pending the Supreme Court's decision in *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, supra. Our holdings were based, however, on a thorough review of applicable case law and the application in *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524 (11th Cir. 1988), to the facts before us. *Ingraham* and *Electro Services* remain precedent, and, consequently, Industrial Chemical's convenience notwithstanding, we refuse to stay the judgments.[1]

II

Industrial Chemical submits that our decision contradicts our traditional interpretation of the wrongful death act, and that we should reconsider our holding that the punitive damages awarded in these cases are not sufficiently analogous to criminal punishments to warrant application of the Eighth Amendment. These arguments were, however, addressed in full in our first opinion, and Industrial Chemical raises no controlling matter of law or fact that was overlooked or not disposed of in that opinion. Consequently, we decline to reconsider our holdings that punitive damages awarded in a civil proceeding are not subject to the constitutional restrictions of the Eighth Amendment, and that the wrongful death act is not penal in effect and is not of that class of cases sufficiently analogous to criminal punishments in which they are administered to justify application of the Eighth Amendment.

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[1] We note that the writ of certiorari was granted in *Kelco Disposal* on December 5, 1988, more than two months after our first opinion was released.

III

The final issue for review on rehearing is Industrial Chemical's assertion that we failed in our opinion to address its argument that the lack of standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death act violates its rights under the Due Process Clause of the Fourteenth Amendment.

> "As the Supreme Court has repeatedly made clear, the content of due process is not limited to the specific provisions of the Bill of Rights. Nor is due process confined to criminal prosecutions; it applies to any legal proceeding or regimen by which any person may be deprived of 'life, liberty, or property.' Due process requires, in whatever context, that legal procedures be consistent with 'fundamental fairness'; that they be consonant with 'ordinary notions of fair play and the settled rules of law'; that they accord with 'traditional notions of fair play and substantial justice'; and that they not offend 'the community's sense of fair play and decency.' However phrased, the message is clear: due process mandates at all times, in all circumstances, and for all defendants, 'fundamental fairness' at the hands of the law."

J. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 151-52 (1986). (Citations omitted.) The command of due process in the context of punitive damages requires, however, a balance between the due process rights of both the plaintiff and the defendant.

A

Our cases have long held that evidence of the defendant's wealth, or lack of wealth, is highly prejudicial and, therefore, inadmissible (and our cases recognize no distinction

between situations involving compensatory damages and those involving punitive damages):

> "In *Ware (v. Cartledge*, 24 Ala. 622, 60 Am.Dec. 489 (1854)), the plaintiff was permitted to prove, over objection, that the defendant possessed property valued at $20,000. Reversing the trial court, this court said that if wealth of a defendant is permitted then common justice requires a converse rule to prevail in the case of poor defendants. Justice Ligon wrote that common sense revolts at the adoption of such a rule. 'For sad would be the fate of that country, whose laws conceded to the insolvent bully, seducer, or slanderer, the privilege of perpetrating his wrongs with comparative impunity, under assurance that, when sued for his practices, the damages would be graduated to his present ability to pay them, and consequently would be merely nominal. No sound principle of law tolerates such a practice.' (Citing cases.) Not only have our cases held that the wealth of a defendant is not admissible, but [they] also have held inadmissible the poverty of a plaintiff. In *Pool* [*v. Davers*, 30 Ala. 672 (1857),] this court said that a plaintiff's being poor is not a legitimate matter for the consideration of the jury in any point of view.
>
> "While we recognize that other jurisdictions do permit the introduction into evidence [of] the wealth of a defendant, we adhere to our rule of excluding evidence of wealth of the defendant. Even though the rule was announced by this court in 1854, we opine that it is sound today—and for the same reason. *Liability for damages cannot be determined by the economic condition of either party.* Cf. *Allison v. Acton-Etheridge Coal Co., Inc.*, 289 Ala. 443, 268 So. 2d 725 (1972)."

Southern Life & Health Ins. Co. v. Whitman, 358 So. 2d 1025, 1026-27 (Ala. 1978). (Emphasis added.) Consequently, evidence of financial worth cannot be introduced during the factfinding process to temper or mitigate a jury's potential award without impugning the process itself. Further, finding such evidence prejudicial and, therefore, inadmissible does not work a deprivation of the constitutional guaranty of due process: subject to the limitation that a party may not be precluded from presenting facts supporting his theory of the case, a rule of evidence constitutes due process of law if it is reasonable and affords an opportunity for defense. *Crowell v. Benson*, 285 U.S. 22 (1932).

Dean Gamble notes that "the Alabama approach with respect to the admissibility of evidence concerning the relative wealth of the defendant is a departure from that used in other jurisdictions." C. Gamble, *Alabama Law of Damages*, § 37-9, at 491, n. 7 (2d ed. 1988). For example, in Florida, evidence of financial worth is admissible where punitive damages are allowable: "The purpose of the rule of evidence is to indicate to the jury [in] what amount, if any, a verdict would be proper to assess for punishment and at the same time not render the defendant bankrupt." *Tallahassee Democrat, Inc. v. Pogue*, 280 So. 2d 512 (Fla. Dist. Ct. App. 1973). Additionally, "A hundred dollar punitive liability may be sufficient punishment for a man of limited means; a hundred thousand dollar punitive liability might be inadequate for a man of great wealth. For these reasons, courts permit the plaintiff claiming punitive damages to introduce evidence showing something of the defendant's financial resources. . . ." D. Dobbs, *Handbook on the Law of Remedies*, § 39, at 218-19 (1973).

Nevertheless, policy considerations are paramount in our continued adherence to that rule of evidence first announced in *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489 (1854). For instance, a plaintiff could show himself to be poor and the defendant to be of great wealth; the

sympathies of the jury would possibly be aroused, and the punitive award would reflect the economic conditions of the parties and not the liability. Conversely, a defendant could show himself to be poor and the plaintiff to be of great wealth, and concessions would be made to the "insolvent bully . . . [and] damages would be graduated to his present ability to pay them, and consequently would be merely nominal." *Ware v. Cartledge*, 24 Ala. at 626. Accordingly, we reaffirm our substantive rule of law that liability for damages cannot be determined by the economic condition of either party, and, therefore, we hold that "fundamental fairness" in the context of punitive damages does not require considerations of a wealth-based standard for their award prior to determining liability.

Further, the awarding of punitive damages is discretionary with the jury (*Roberson v. Ammons*, 477 So. 2d 957 (Ala. 1985); *Tallant v. Grain Mart, Inc.*, 432 So. 2d 1251 (Ala. 1983); *Deaton, Inc. v. Burroughs*, 456 So. 2d 771 (Ala. 1984); *Morgan v. South Central Bell Tel. Co.*, 466 So. 2d 107 (Ala. 1983); *Shiloh Const. Co. v. Mercury Const. Corp.*, 392 So. 2d 809 (Ala. 1980); and *Crum v. McGhee*, 289 Ala. 244, 266 So. 2d 855 (1972)), when there is a willful and malicious wrong, except for negligence in wrongful death cases:

> "To authorize 'punitive,' 'exemplary,' or 'vindictive' damages, there must be '. . . negligence,' meaning such an entire want of care as to raise the presumption that the person at fault is conscious of the probable consequences of his carelessness and indifferent to the danger of injury to the person or property of others. Punitive damages are allowable for a wrong maliciously perpetrated, or where the wrongful act is done knowingly, wantonly, and recklessly, under such circumstances as to indicate that the wrongdoer knew that the act would probably injury persons or property, or where the act was so grossly

> negligent, oppressive, or fraudulent as to amount to malice."

C. Gamble, *Alabama Law of Damages*, § 4-1 (2d ed. 1988). (Citations omitted.)

If the existence of malice, wantonness, or negligence is supported as fact by evidence in the record, "we must see no offense to the Constitution, and no deprivation of any constitutional right of [the defendant] in committing the assessment of such damages, including the amount to be allowed, to the sound discretion of the jury." *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Malice, wantonness, and negligence cannot be found in a vacuum, and in the event that their existence as fact is not supported by evidence in the record, the defendant may remove the case or the issue from the trier of fact; see Rule 56, A.R.Civ.P., summary judgment (no genuine issue of material fact), and Rule 50 A.R.Civ.P., directed verdict and judgment notwithstanding the verdict (complete absence of proof on an issue material to the claim).[2]

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[2] To limit the jury's discretion other than by proper instruction as to the circumstances under which punitive damages are awarded, would appear to violate the right of trial by jury guaranteed by Article I, § 11, of the Alabama Constitution of 1901 ("That the right of a trial by jury shall remain inviolate"):

> "The following propositions of law, each of which is involved in this case, are deemed to be either axiomatic or undeniable:
>
> ". . . .
>
> "(7) To except these individual and inalienable rights of the people out of the general powers of government is to prohibit the Legislature, the executive, or the judicial branch, one or all, from destroying or impairing such reserved rights of the people.
>
> "(8) To provide that such reserved rights shall forever remain inviolate is to forbid the sovereign through the leg-

Therefore, "fundamental fairness" at the hands of the law does not extend to the defendant the right to impugn the factfinding process by introducing evidence of financial condition or solvency, or by limiting the jury's discretion to award punitive damages other than by proper jury instruction, at the expense of the plaintiff's right to "fundamental fairness." Consequently, standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death act to meet the command of due process must exist in post-judgment review of the jury's verdict.

B

Although not imposing the stigma of crime or the unique burdens of imprisonment, punitive damages nonetheless serve to place the defendant on notice that it has engaged in conduct considered intolerable by society and also serves to deter others from following the defendant's example. But in levying a punitive award, the degree or amount must be comparable to the act deserving punishment. And though the defendant has engaged in intolerable conduct, it does not surrender its right to "fair" punishment; in other words, "although punitive damages need bear no particular relationship to actual damages, they, nonethe-

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islature, executive, or judicial department, one or all, from ever burdening, disturbing, qualifying, or tampering with, these rights, to the prejudice of the people."

Alford v. State, 170 Ala. 178, 54 So. 213 (1910).

See Alabama Pattern Jury Instructions 11.01 (punitive damages may be awarded "where the plaintiff reasonably satisfies the jury from the evidence that plaintiff has been (willfully or) wantonly injured or damaged by the defendant"); 11.03 (the jury must take into consideration "the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs"); and 11.18 (the jury's verdict "should be directly related to the culpability of the defendant(s) and necessity of preventing similar wrongs in the future"). *Alabama Pattern Jury Instructions—Civil* (1974).

less, must not exceed an amount that will accomplish society's goals of punishment and deterrence." *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), citing *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469 (Ala. 1988), *City Bank of Alabama v. Eskridge*, 521 So. 2d 931 (Ala. 1988), and *Roberson v. Ammons*, 477 So. 2d 957 (Ala. 1985). Hence, we must ask, after the return of a jury award of punitive damages, what process is due the defendant to insure that he has been provided "fundamental fairness" at the hands of the law and to insure that society's goals of punishment and deterrence have been accomplished?

> "If a defendant is dissatisfied with a jury's verdict, and feels that it is excessive, or otherwise flawed, he is entitled to the protection of a variety of safeguards. The defendant may move for remittitur and a new trial in the trial court, and may appeal as a matter of right from the denial of either. He is entitled to a *de novo* review of the jury's verdict on appeal [Code 1975, § 12-22-71]. The appellate courts in this state have the authority to order a new trial due to the excessiveness of the verdict, to conditionally order a new trial unless the plaintiff accepts a remittitur [*United Services Auto. Ass'n v. Wade*, [Ms. 86-1151, Mar. 17, 1989) ___ So. 2d ___ (Ala. 1989)], and to order the trial court to conditionally order a new trial unless the plaintiff accepts a remittitur [*Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916 (Ala. 1981)].
>
> "If a defendant properly moves the trial court to do so, the trial court is obligated to state on the record its reasons for either interfering with the jury's verdict or not interfering with it [*Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986)]. And, in making the determination of whether the verdict is excessive (or inadequate),

a trial court is authorized to consider the following non-exclusive list of factors:

" ' "(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

" ' "(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

" ' "(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

" ' "(4) The financial position of the defendant would be relevant.

" ' "(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

" ' "(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

" ' "(7) If there have been other civil actions against the same defendant, based on the same

> conduct, this should be taken into account in mitigation of the punitive damages award." ' "

Central Alabama Electric Cooperative v. Tapley, [Ms. 87-1188, May 12, 1989] ___ So. 2d (Ala. 1989), quoting from *Green Oil Co. v. Hornsby*, 539 So. 2d at 223-24 (quoting in turn *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring)).

From these considerations (and from those reaffirmed in *Hammond v. City of Gadsden*, 493 So. 2d 1379 (Ala. 1986), emerge two related protections: First, a requirement of "reasonableness, of proportionality, of sensible relation between punishment and offense," and, second, a guarantee of "not just bare survival, but continued productive economic viability." C. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, supra, at 156 (discussing Magna Charta's intent to curb unlimited punitive authority). Nothing prevents the defendant, at a hearing on a motion for new trial based on an allegedly flawed jury verdict,[3] from presenting evidence to prove one or more of the above considerations, and, by doing so, to guarantee that his right to due process of law in regard to the jury's award is protected. In sum, "fundamental

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[3] "[A] jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection. It is only in those cases that a trial court, pursuant to A.R.Civ.P. 59(f), and this Court, pursuant to Code 1975, § 12-22-71, may interfere with a jury verdict. Insofar as damages are concerned, a jury verdict may be flawed in two ways. First, it may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure. . . . Second, a jury verdict may be flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive." *Hammond v. City of Gadsden*, 493 So. 2d at 1379.

fairness" requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonable, disproportionate, or economically destructive (the plaintiff, of course, is entitled to offer proof contradicting the defendant's, or, conversely, to offer proof that the award is inadequate).

Subsequently, the trial court will state for the record the factors considered in either granting or denying a motion for new trial based upon the alleged excessiveness or inadequacy of the jury's verdict, as required by *Hammond v. City of Gadsden*, supra. The defendant may appeal, as a matter of right, from the denial of his motion for new trial, and he is entitled to a review of the verdict on appeal, where he once again may present proof as to the excessiveness of the award. See Ala. Code 1975, § 12-22-71. We emphasize, as we did in *Hammond v. City of Gadsden*, that no substantive rule of law is changed by this procedure; and "[w]e make no attempt to enumerate all of the factors which may be considered by the trial court," leaving that to its sound discretion. *Hammond v. City of Gadsden*, 493 So. 2d at 1379. We do, however, reaffirm the substantive rules of law, stated in our earlier opinion in this case, "that a trial court may not conditionally reduce a jury verdict merely because it believes the verdict overcompensates the plaintiff; that a trial court may not substitute its judgment for that of the jury; *and that there can be no ironclad rule in considering the adequacy or excessiveness of a verdict. Each case must be determined by its own facts and on its own merits.*" *Industrial Chemical & Fiberglass Corp. v. Chandler*, [Ms. 86-381, -385, January 16, 1989] ___ So. 2d at ___ (Ala. 1989), citing *Hammond v. City of Gadsden*, supra. (Emphasis added.)

We noted in our second opinion in this case that Industrial Chemical did not provide either the trial court (on post-judgment review) or this Court with financial data evidencing and supporting its statement that it would face

imminent financial destruction if the awards were allowed to stand. Further, we determined that Industrial Chemical's culpability, after a thorough review of the record, was accurately reflected by the verdicts, and that the verdicts were appropriate and desirable for discouraging similar conduct by others in the future. On rehearing, Industrial Chemical submits no argument on any of the mitigating factors listed above, and we decline to grant the application for rehearing to give it the opportunity to do so.[4] Industrial Chemical received the process due to guarantee "fundamental fairness" in the jury's verdicts, and, consequently, we find no violation of the Fourteenth Amendment as applied to the imposition of punitive damages under the wrongful death act.

OPINION EXTENDED; APPLICATIONS DENIED.

Jones, Almon, Shores, and Steagall, JJ., concur.

Maddox, and Houston, JJ., concur in part and dissent in part.

Industrial Chemical v. Chandler

MADDOX, JUSTICE (Concurring in part and dissenting in part).

For my views on this case, see my concurring in part and dissenting in part opinion filed January 20, 1989, ___ So. 2d ___ (Ala. 1989).

Additionally, I would stay the execution of this judgment, however, pending a decision of the Supreme Court of the United States in its review of *Browning-Ferris In-*

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[4] Industrial Chemical chose not to submit adequate argument on this issue in its first brief as appellant, in its reply brief, its post-remand brief, or its brief in support of its application for rehearing. Industrial Chemical has been given every opportunity to "address this pressing issue," and it has not done so. We decline to allow it a fifth opportunity to do so.

dus. of Vermont, Inc. v. Kelco Disposal, Inc., 845 F.2d 404 (2nd Cir. 1988), cert. granted, ___ U.S. ___ ,109 S.Ct. 527 (No. 88-556, Dec. 5, 1988).

Houston, J., concurs.

APPENDIX E

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1988-89

87-1188

Central Alabama Electric Cooperative

v.

Janice C. Tapley

Appeal from Tallapoosa Circuit Court
(CV-87-07)

PER CURIAM.

Central Alabama Electric Cooperative ("CAEC"), a cooperative non-profit membership corporation, appeals from a judgment against it on a general jury verdict in a wrongful death case. Janice C. Tapley sued as a result of the electrocution of her husband, Wendall M. Tapley. This action was brought pursuant to Alabama Code 1975, § 25-5-11(a), which gives to dependents of an employee, killed under circumstances that might create liability on the part of a third party, the right to commence an action against that third party. CAEC filed motions for a directed verdict on the issues of negligence, wantonness, and Tapley's contributory negligence. The trial court denied these motions, and the case was submitted to the jury. After the jury returned a verdict in the amount of $1 million, CAEC filed a motion for a judgment notwithstanding the verdict on the issues of negligence, wantonness, and Tapley's contributory negligence. This motion, too, was denied.

Tapley, a truck driver employed by Diversified Support Services to haul asphalt and related materials to and from an asphalt plant, was killed when he raised the "trailer dump" of his tractor-trailer rig into an uninsulated electric distribution line ("line") owned by CAEC. Tapley was called to work, unexpectedly, around 6:00 o'clock on the morning of his death. Around 7:45 A.M. that morning, Tapley was attempting to clean water, dirt, and other debris from his trailer dump prior to taking on a load of asphalt. He positioned the rig underneath the line, raised the trailer dump into the line, and, while standing on the wet, muddy ground beside the truck, apparently reached back into the cab and contacted the dump control switch, apparently attempting to raise or lower the trailer dump.

The line with which Tapley's trailer dump came in contact had been erected by CAEC within a week of Tapley's death, pursuant to a request by Pee Wee Ingram, one of the owners of the asphalt plant. Hampton Holman, CAEC's district manager, and Lewis Reynolds, CAEC's lead lineman, met with Ingram prior to construction of the line to discuss the type of electrical service needed and the location of the line necessary to provide that service. The CAEC representatives saw trailer dumps similar to the one operated by Tapley, as well as other equipment, at the asphalt site. CAEC looked at several alternative routes by which to string the line to supply electrical power so that the line could go to a switchbox already in place next to the asphalt plant, as Ingram had requested. While discussing the possibility of stringing the line across the areas of stockpiling (which areas required the use of trailer dumps in an upright position), Ingram stepped off the length of a trailer dump and told CAEC's representatives that the trailer, including the height of the bed and tarpaulin rack, would be between 35 and 36 feet, if it could have been raised absolutely perpendicularly. Using this information, CAEC determined that it could not string the line across areas of stockpiling, where dumping was ob-

viously taking place. Ingram agreed with this and with CAEC's determination to string the line across the roadway to the asphalt plant.

There was no designated area for drivers to clean out their trailer dumps prior to taking on a load of asphalt. Viewing the evidence most favorably to Tapley, we find that the area where Tapley was attempting to clean out his trailer dump at the time of his death was the firmest or hardest, and, thus, safest area. There was also other evidence that showed that there were several other areas away from the line, with no overhead obstructions, where Tapley could have cleaned out his trailer dump—for example, the roadway, from the entrance gate toward an incline, along which trailers were parked from time to time; a large area on a hill, where trailers were placed from time to time; and another area where trailers were parked in which crushed rock had been placed.

The roadway on which the accident occurred runs east to west, between a quarry operation on the south side and the asphalt operation on the north side. Over CAEC's objection, the trial court allowed evidence that eight to nine years earlier, for a different company, CAEC had placed three orange markers or balls on a separate power line that runs parallel to the left of the roadway in the quarry area. There were no other orange balls or any warning devices placed anywhere else in the area, and there were other electric lines that crossed the roadway into the plant on which no orange balls were placed. It is undisputed that CAEC was told by Ingram, prior to the erection of the line involved in this action, that there would be no stockpiling or placing of anything else on the ground in the area chosen for service. In addition, and again over CAEC's objection, the trial court allowed evidence of CAEC's placement of orange balls and ribbons, subsequent to the accident, upon the line that Tapley contacted, as well as Holman's testimony that he had intended to place an orange ball over the roadway (even though Ingram had

told him there would be no dumping), but that he did not have any in stock. Reynolds testified that at the time he constructed the line "he didn't see any reason to put a ball there," because he was told that there would not be unloading or dumping along this roadway.

It is undisputed that the height of the line was 6 1/2 to 8 feet above the National Electrical Safety Code ("NESC") minimum requirement. However, Tapley's expert testified that the height of the line was in violation of the NESC, because the "given local conditions were not considered," and, he said, "local conditions" means that "you should take into consideration everything that's possible to take into consideration to preserve the safety of the lines."

With that brief factual background, we proceed to consider all seven issues raised by CAEC. We, of course, will develop the facts more fully as the resolution of each issue requires.

I.

The first issue CAEC raises is the constitutional validity of Code 1975, § 6-5-410, the Alabama wrongful death statute, under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.[1] The primary attack pressed by CAEC is that, under Alabama's unique wrongful death statute, it is fundamentally unfair 1) for juries to award punitive damages for, in some cases, including this one, simple negligence (or misconduct less than intentional misconduct), and 2) to permit juries to assess punitive damages without standards to guide the determination of an appropriate amount.

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[1] The Attorney General was notified by this Court that this issue was pending and, after reviewing the briefs of counsel, the Attorney General declined to submit a brief. See A. R. App. P.

A. Fourth, Fifth, and Sixth Amendments

We will not analyze the appellant's contention that § 6-5-410, or an award of punitive damages generally, implicates the Fourth, Fifth, and Sixth Amendments, for it has not identified what specific rights it feels have been violated. Moreover, CAEC has made no specific arguments under either amendment, and this Court will not speculate or search for a particular basis for a constitutional challenge. See A. R. App. P. 28(a)(5); see also *Henderson v. Alabama A & M Univ.*, 483 So. 2d 392 (Ala. 1986). To the extent that CAEC alleges a violation of its rights to due process of the law, we address that argument under our treatment of the Fourteenth Amendment, *infra*. Any other Fourth, Fifth, or Sixth Amendment issue is waived under state procedural law, because CAEC has neither specifically argued nor specifically identified any other particular right.

B. Eighth Amendment

CAEC next maintains that the fact that our wrongful death statute mandates punitive damages requires us to analyze the "excessive fines" clause of the Eighth Amendment. A majority of this Court squarely rejected that very argument in *Industrial Chem. & Fiberglass Corp. v. Chandler*, [Ms. 86-381, Sept. 30, 1988, *on return to remand*, Jan. 20, 1989] ___ So. 2d ___ (Ala. 1989). In *Industrial Chemical*, we relied heavily on *Ingraham v. Wright*, 430 U.S. 651 (1977). As the Court in *Ingraham* noted, the provisions of the Eighth Amendment may apply to punishments that, although not strictly criminal, are quasi-criminal in nature. *Ingraham*, 430 U.S. at 669 n. 37. We refuse to reason, however, that, because the "excessive fines" clause may apply to quasi-criminal sanctions, such sanctions include those that involve allegedly excessive civil jury verdicts. Such circular reasoning would make little sense and bad law. Consequently, on the authority of *In-*

dustrial Chemical, we reject the argument that the judgment in this case implicates the Eighth Amendment.

C. Fourteenth Amendment

CAEC's final constitutional argument is that it has been denied its rights to procedural and substantive due process under the Fourteenth Amendment by the judgment below.

1. Procedural due process

We find that the procedural due process issue has not been adequately preserved for our review, due to noncompliance with fundamental concepts of issue preservation under state law. As we stated in *Bevill v. Owen*, 364 So. 2d 1201, 1203 (Ala. 1979):

> "It is a fundamental rule of appellate procedure that, regardless of [the] merits of [an] appellant's contentions, appellate courts will not review questions not decided by the trial court. *McWhorter v. Clark*, 342 So. 2d 903 (Ala. 1977). The Supreme Court cannot put a trial court in error for failure to rule on a matter which, according to the record, was not presented to nor decided by it. *Defore v. Bourjois, Inc.*, 268 Ala. 228, 105 So. 2d 846 (1958)."

CAEC's procedural due process argument essentially progresses on three tracks. First, it argues that defendants subject to the imposition of punitive damages are entitled to the protection of a bifurcated trial. In the case at bar, CAEC made no motion to bifurcate the trial, and we will not hold the trial court in error for not bifurcating the trial on its own motion. See *Coburn v. American Liberty Ins. Co.*, 341 So. 2d 717 (Ala. 1977); A. R. Civ. P. 42(b).

The second procedural due process issue raised by CAEC is the failure of the trial court to charge the jury that clear and convincing evidence is necessary to support any assessment of punitive damages.

> "No party may assign as error the giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless he objects thereto before the jury retires to consider its verdict, stating the matter to which he objects and the grounds of his objection."

A. R. Civ. P. 51. In the case at bar, we find nothing in the record that suggested to the trial court that it charge the jury on the "clear and convincing" standard; more importantly, we find no objection to the trial court's failure to so charge the jury.

The final ground upon which CAEC rests its procedural due process argument is that the trial court erred by not charging the jury with the guidelines set forth by this Court in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986) (and clarified in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)). As with the "clear and convincing" issue, however, CAEC did not object to the trial court's failure to give such an instruction, nor did CAEC request such an instruction.

In summary, we hold that all of CAEC's procedural due process arguments are not properly before this Court.

2. Substantive due process

Does the due process clause of the Fourteenth Amendment require that juries be guided by objective criteria in order to properly assess punitive damages? Stated perhaps more accurately, is it fundamentally unfair for a jury to award punitive damages without the guidance of objective criteria?

We recognize, indeed, we are faced almost daily with, the comments of various jurists, philosophers, scholars, and members of the national bar assailing the practicality in civil cases of the jury system and lamenting its continued existence. The three bases of criticism most often voiced

are the helplessness and lack of sophistication of jurors obligated to resolve issues in complex litigation; the tendency of modern juries to overcompensate injured tort victims for noneconomic damages; and the "unbridled" discretion jurors enjoy in imposing massive punitive damages awards. On the larger scale, those complaints, and the very issue under review here, are really attacks on the civil justice system as a whole.

Just because "juries have always done it that way" is no adequate response. But we must pause to recall that, until *very* recently, attacks on jury verdicts have not been rooted in the federal constitution. History instructs us that, in the typical case involving noneconomic damages and punitive damages, once the jury has been instructed on and determines liability, the amount of compensation to be awarded and the extent of punishment to be meted out are subjects unquestionably within the sacred domain of the jury's discretion. A large jury verdict was subject to judicial revision only if the form of the verdict was incorrectably flawed, or if the verdict was undeniably the product of some improper motive, such as bias or prejudice, or bent with an improper emotion, such as passion.

Tossed into the lessons of the past is the fact that the only damages available in a wrongful death action brought pursuant to Alabama law are punitive damages. The sanctity of human life, the noble goal of preserving human life, and society's desire to punish those whose conduct results in the loss of human life, have all been accepted by our Legislature as criteria outweighing the seeming anomaly of permitting punitive damages for simple negligence. This view rests on the premise that one may be adequately compensated for his injuries, but the value of a human life has no measure. Punishing the tort-feasor dissuades others from engaging in life-endangering conduct.

To paraphrase a famous (or infamous) quotation, the American system of civil justice is the worst in the world—

except for all of the rest. As the "problems" with the jury system have been pointed out with increasing frequency, so has the justice system responded.

If a defendant is dissatisfied with a jury's verdict, and feels that it is excessive, or otherwise flawed, he is entitled to the protection of a variety of safeguards. The defendant may move for remittitur and a new trial in the trial court, and may appeal as a matter of right from the denial of either. He is entitled to a *de novo* review of the jury's verdict on appeal.[2] The appellate courts in this state have the authority to order a new trial due to the excessiveness of the verdict, to conditionally order a new trial unless the plaintiff accepts a remittitur,[3] and to order the trial court to conditionally order a new trial unless the plaintiff accepts a remittitur.[4]

If a defendant properly moves the trial court to do so, the trial court is obligated to state on the record its reasons for either interfering with the jury's verdict or not interfering with it.[5] And, in making the determination of whether the verdict is excessive (or inadequate), a trial court is authorized to consider the following non-exclusive list of factors:

> " '(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

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[2] Code 1975, § 12-22-71.

[3] *E.g., United Services auto. Ass'n v. Wade*, [Ms. 86-1511, March 17, 1989] ___ So. 2d ___ (Ala. 1989).

[4] *E.g., Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916 (Ala. 1981).

[5] *E.g., Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986).

" '(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

" '(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

" '(4) The financial position of the defendant would be relevant.

" '(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

" '(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

" '(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.' "

Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989) (quoting *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring)).

Punitive damages should not exceed an amount necessary to accomplish society's goals of punishment and deterrence. But the *degree* of punishment necessary to achieve those goals changes with each case. In the rarest cases, involving the most egregious conduct, juries should

be entitled to punish defendants so severely as to destroy them; justice demands that.[6] But in the typical punitive damages case, the award should punish without destroying. That, in a nutshell, is the way punitive damages and the civil justice system coexist.

The identical case tried to different juries will likely produce different results, but that does not necessarily smack of a lack of fundamental fairness. That is inherent in the nature of juries, given the imperfection of man and his system of justice. Some discretion must be afforded to juries to assess punitive damages as they see fit. We can envision no set of carved-in-granite standards that would guide every jury in every conceivable case. Discretion tolerates elasticity, but the jury's discretion is by no means unbridled. The "whims" of any given jury are still harnessed by the authority of the trial court and appellate courts.

Due to the safeguards now in place in Alabama, we find no merit to CAEC's allegation that its rights to substantive due process have been denied, or, based on the issues preserved for our review, that our wrongful death statute is unconstitutional. We have confidence in our system of civil justice and faith that that system will accommodate change as it is required.

We close our discussion with the wisdom of Mr. Justice Cardozo:

> "The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is

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[6] See *Ridout's-Brown Service, Inc. v. Holloway*, 397 So. 2d 125, 127-28 (Ala. 1981) (Jones, J., concurring).

> beaten something which has a constancy and uniformity and average value of greater than its component elements. The same thing is true of the work of juries. I do not mean to suggest that the product in either case does not betray the flaws inherent in its origin. The flaws are there as in every human institution. Because they are not only there but visible, we have faith that they will be corrected. There is no assurance that the rule of the majority will be the expression of perfect reason when embodied in constitution or in statute. We ought not to expect more of it when embodied in the judgments of the courts. The tide rises and falls, but the sands of error crumble."[7]

II.

CAEC argues that the trial court erred in failing to grant a directed verdict or JNOV in its favor on the issues of negligence and wantonness. We disagree.

This action was pending prior to June 11, 1987; therefore, Code 1975, § 12-21-12, as amended, does not apply and the applicable standard of review is the "scintilla rule." *Kizziah v. Golden Rule Insurance Co.*, 536 So.2d 943 (Ala. 1988).

In *Caterpiller Tractor Co. v. Ford*, 406 So.2d 854, 856 (Ala. 1981), this Court stated the standard of review applicable to a directed verdict:

> "A directed verdict is proper only where there is a complete absence of proof on an issue material to the claim or where there are no disputed questions of fact on which reasonable people could differ. *Deal v. Johnson*, 362 So.2d 214 (Ala. 1978)
> . . . .

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[7] Cardozo, *The Nature of the Judicial Process* 143 (1921)

> "In addition, the trial court must view the entire evidence, and all reasonable inferences which a jury might have drawn therefrom, in the light most favorable to the non-moving party. *Alabama Power Company v. Taylor*, 293 Ala. 484, 306 So.2d 236 (1975); *Vintage Enterprises, Inc., v. Cash*, 348 So.2d 476 (Ala. 1977)."

See also *Orr v. Turney*, 535 So. 2d 150, 154 (Ala. 1988).

A. Negligence

There was sufficient evidence of negligence to withstand a motion for a directed verdict and a motion for a judgment notwithstanding the verdict. As a supplier of electricity, CAEC is not an insurer of the safety of the general public and is not under an obligation to so safeguard its lines or equipment that by no possibility can injury result therefrom. The duty of an electrical company is to exercise that degree of care commensurate with the danger involved. *Alabama Power Co. v. Tatum*, 293 Ala. 500, 306 So.2d 251 (1975); *Alabama Power Co. v. Berry*, 254 Ala. 228, 48 So.2d 231 (1950).

> " 'In *Bush v. Alabama Power Co.*, 457 So.2d 350, 353 (Ala. 1984), the Court restated the duty of a power company with *regard to the use and location of uninsulated electrical lines*: "The duty of an electric company, in conveying a current of high potential, *to exercise commensurate care under the circumstances, requires it to insulate its wires, and to use reasonable care to keep the same insulated*, wherever it may reasonably be anticipated that persons, pursuing business or pleasure, may come in contact therewith. This statement of the rule implies that, in the absence of statute or municipal ordinance, it is not necessary to insulate wires which are so placed that no one could reasonably be expected to come in proximity to them." *Foster v. Alabama Power*

> *Co.*, 395 So.2d 27, 30 (Ala. 1981), citing Curtis on the *Law of Electricity*, § 510. In other words, Alabama Power must either insulate its electrical lines, or locate them in a position where they pose no danger to human life. *However, the duty to insulate does not arise absent notice, actual or constructive, that persons may come into contact with the uninsulated wires. Alabama Power Co. v. Alexander*, 370 So.2d 252 (Ala. 1979).' "

Alabama Power Co. v. Cantrell, 507 So.2d 1295, 1297 (Ala. 1986) (quoting *Alabama Power Co. v. Brooks*, 479 So.2d 1169, 1172 (Ala. 1985)). (Emphasis added.)

Tapley's expert testified that the height of the line was in violation of the NESC, because "given local conditions were not considered." He testified that "local conditions" means that "you should take into consideration everything that's possible to take into consideration to preserve the safety of the lines." Although this conflicts with other expert testimony, this is sufficient evidence of negligence for the jury to consider, for CAEC erected the line lower than the body of the trailer dump would reach when in a raised position. Even though CAEC assumed that there would be no dumping in the area of the line, a fact question existed as to whether CAEC should have foreseen that trailer dumps would be raised to an upright position in that area. Negligence can be predicated upon a defendant's failing to appreciate the hazards of conditions it creates. *Bush v. Alabama Power Co.*, 457 So.2d 350 (Ala. 1984). We hold that the trial court did not err in failing to grant a directed verdict or JNOV in favor of CAEC on the negligence count.

B. Wantonness

What constitutes wanton misconduct depends upon the facts presented in each particular case. *Brown v. Turner*, 497 So. 2d 1119 (Ala. 1986); *Trahan v. Cook*, 288 Ala. 704,

265 So.2d 125 (1972); *Westbrook v. Gibbs*, 285 Ala. 223, 231 So.2d 97 (1970). In *Lynn Stickland Sales & Service, Inc. v. Aero-Lane Fabricators, Inc.*, 510 So.2d 142 (Ala. 1987), the majority of this Court made it perfectly clear that wantonness, which requires some degree of conscious culpability, is not to be confused with negligence, (i.e., mere inadvertence):

> "Wantonness is not merely a higher degree of culpability than negligence. Negligence and wantonness, plainly and simply, are qualitatively different tort concepts of actionable culpability. *Implicit in wanton, willful, or reckless misconduct is an acting, with knowledge of danger, or with consciousness, that the doing or not doing of some act will likely result in injury. . . .*
>
> "Negligence is usually characterized as inattention, thoughtlessness, or heedlessness, a lack of due care; whereas *wantonness is characterized as an act which cannot exist without a purpose or design, a conscious or intentional act.* 'Simple negligence is the inadvertent omission of duty; and *wanton or willful misconduct is characterized as such by the state of mind with which the act or omission is done or omitted.' McNeil v. Munson S.S. Lines*, 184 Ala. 420, 425, 63 So. 992 (1913). [Emphasis added.] . . .
>
> ". . . .
>
> 'Willful and wanton conduct has a well-defined meaning at law. It is sometimes expressed in terms of "reckless disregard of the safety of another." *Willful and wanton conduct should not be confused with negligence. It has been correctly stated that the two concepts are as "unmixable as oil and water."* ' [Citation omitted, emphasis added.]

> " '. . . *Willfulness or wantonness imports premeditation, or knowledge and consciousness that the injury is likely to result from the act done or from the omission to act*, and strictly speaking, is not within the meaning of the term "negligence," which conveys the idea of inadvertence, as distinguished from *premeditation or formed intention.*' " [Citation omitted, emphasis added.]

510 So. 2d at 145-46 (emphasis added).

Is there a scintilla of evidence that, in placing the uninsulated line at the place and height that it was erected, CAEC knew that injury would likely result? We find the requisite scintilla of evidence to support a wantonness claim from Holman's testimony:

> "Q. . . . And, the decision was made not to put an orange ball on this line; wasn't it?
>
> "A. We didn't have any.
>
> "Q. You didn't have any? Oh, you didn't have any? You would have put them up there?
>
> "A. Yes, sir, we would've put them up there.
>
> "Q. But, you didn't have any right then. You went ahead and hooked that power up; didn't you?
>
> "A. Yes, sir, we hooked the power up.
>
> ". . . .
>
> "Q. . . . [Y]ou don't leave it up to the customer as to orange balls, do you? You make that decision.
>
> "A. Yes, sir.
>
> "Q. And, you had already made that decision to put orange balls up, but you didn't have any in stock.

"A. Yes, sir.

"Q. And, orange balls are designed for safety; aren't they? That's what you told me on—.

"A. Well, you can call it that. A reminder, ever how you want to use it.

"Q. But, its designed—its a safety device.

"A. To let you know its up there.

". . . .

"Q. You don't buy, you don't adhere, you don't adopt the theory that orange balls serve no real or useful purpose?

"A. Well, we hoped they would.

"Q. So, you say that orange balls do serve a real or useful purpose?

"A. We hoped people would look at them.

"Q. And, that's why you put them up there; isn't that true?

"A. To try and remind people that its up there.

"Q. And, that's why you intended to put them up here on this one; isn't that true?

"A. Yes, sir.

". . . .

"Q. . . . But, Mr. Holman, you intended to put a ball right here, even though you tell us that there wasn't going to be any dumping. You intended to put a ball over the roadway, and you didn't have any in stock: Isn't that what you told us?

"A. Yes, sir.

"....

"Q. Mr. Holman, am I understanding you correctly, that you say you had always intended in spite of what Mr. Ingram told you, that there wasn't going to be any high equipment, that you always intended, from the very beginning, to put a ball over there?

"....

"A. Yes, sir, we intended to put a ball on it."

Although some other witnesses testified that orange balls were used as a warning for low flying aircraft and were helpful in seeing power lines from a distance, Holman does not further explain why he intended to place orange balls on the line. Furthermore, despite knowing the approximate height to which the truck beds would rise and despite knowing that truck beds were raised in several locations on the premises, CAEC nevertheless erected the lines well below the height to which the truck beds were raised. Viewing this testimony and evidence in the light most favorable to Tapley, we cannot hold that, as a matter of law, it would be unreasonable for a jury to infer that Holman, as district manager of CAEC, was aware that there was a likelihood that equipment might come in contact with the uninsulated line and that, if it did so, injury was likely to occur. This was sufficient for the trial court to submit the issue of wantonness to the jury.

III.

CAEC next argues that Tapley was contributorily negligent as a matter of law. In a recent case somewhat similar to the one before us today, we did find contributory negligence as a matter of law. See *Watters v. Bucyrus-Erie Co.*, 537 So. 2d 24 (Ala. 1989). As with negligence generally, however, a finding of contributory negligence turns on the facts and circumstances unique to each case;

for that reason, contrary to the suggestion of Justice Houston's dissenting opinion, we need not overrule *Watters*, for the holding in that case, too, was dependent upon its own particular facts. To be sure, the conduct of the decedent in this case was such that the defendant could justifiably argue, with strong conviction, that the jury should deny recovery because of the decedent's contributory negligence.[8] That can not be our focus, however. Contributory negligence is an affirmative defense that the defendant bears the burden of proving. Rule 8(c), A. R. Civ. P. "Contributory negligence is for the jury where there is a scintilla of evidence to the contrary. *Elba Wood Products, Inc. v. Brackin*, 356 So. 2d 119 (Ala. 1978)." *Bullen v. Roto Finishing Systems*, 435 So. 2d 1256, 1259 (Ala. 1983); see *Hatton v. Chem-Haulers, Inc.*, 393 So. 2d 950, 954 (Ala. 1980).

In order to sustain a finding of contributory negligence as a matter of law, there must be a finding that the plaintiff put himself in danger's way, *Mackintosh Co. v. Wells*, 218 Ala. 260, 118 So. 276 (1928), and a finding that the plaintiff appreciated the danger confronted, *Wilson v. Alabama Power Co.*, 495 So. 2d 48 (Ala. 1986); *Marquis v. Marquis*, 480 So. 2d 1213 (Ala. 1985); *Baptist Medical Center v. Byers*, 289 Ala. 713, 271 So. 2d 847 (1972); *Mackintosh Co. v. Wells, supra*. Moreover, it must be demonstrated that the plaintiff's appreciation of the danger was a conscious appreciation at the moment the incident occurred. *Marquis v. Marquis, supra; Elba Wood Products, Inc. v. Brackin, supra*. Mere "heedlessness" is insufficient to warrant a finding of contributory negligence as a matter of law. *Decatur Light, Power & Fuel Co. v. Newsom*, 179 Ala. 127, 59 So. 615 (1912).

---

[8] This Court might be willing to again entertain, in an appropriate case, the idea of adopting the doctrine of comparative negligence. See *Golden v. McCurry*, 392 So. 2d 815 (Ala. 1981.)

Indulging all favorable presumptions to sustain the trial court's conclusion, *Marquis v. Marquis, supra*, and viewing the tendencies of the evidence in the light most favorable to the party not urging error, we are unable to impose upon this plaintiff the extraordinary consequences of a finding of contributory negligence as a matter of law. After thoroughly scouring the record, we find no evidence that the plaintiff's decedent knew the height of the subject power lines; no evidence that he knew the height to which his dump bed would rise; and no evidence that he knew the lines were uninsulated. He did know that CAEC had been at the plant and that CAEC had made a studied and deliberate decision on how to erect the lines; he therefore may well have assumed that the lines would have been high enough to accommodate his truck while in operation. Finally, we will not hold that he deliberately raised his dump bed into the wires and then purposefully electrocuted himself; such a holding would be repugnant to simple logic and to the tendencies of the evidence presented.

We conclude that there was sufficient evidence to contradict CAEC's defense of contributory negligence and thus to warrant resolution of this issue by the jury.

IV.

CAEC maintains that the Legislature acted arbitrarily and irrationally in excepting wrongful death actions from the operation of §§ 6-11-20 and -21, Code 1975. This exception is codified at § 6-11-29. Because this cause of action was pending prior to June 11, 1987, however, these statutes are inapplicable. See Code 1975, § 6-11-30. While we express no view on the merits of this issue, we observe that, for whatever reason, it is clear that the Legislature's purposeful exclusion of wrongful death actions is totally consistent with the wrongful death statute and with this Court's interpretation and application thereof.

V.

CAEC next contends that the trial court erred in denying its motion *in limine* with respect to all evidence of orange markers or balls. Prior to trial, in considering the motion, the following exchange between the court and one of CAEC's lawyers took place:

> "COURT: If the evidence will support their contention, that is, in every case they should have put [the markers or balls] up there, maybe they should. I don't know what Judge McElroy says [an apparent reference to C. Gamble, *McElroy's Alabama Evidence* (3d ed. 1977)]. It may be that [CAEC's] practice is to put balls up there and make them visible and to call people's attention to the fact that they are there.
>
> "PETE COBB: Judge, we just insist, that before any mention, that I except to the plaintiff being able to mention three. But, before any mention of more than three by anybody comes on, we want a ruling from the court as to whether or not they can mention more than three.
>
> "COURT: We will go with that for the time being until tomorrow morning."

That colloquy consists of the entire "ruling" on the motion *in limine*. Throughout the plaintiff's opening statement, and upon examination of several witnesses during the plaintiff's case-in-chief, several references were made to orange balls or markers—*all without objection*.

In *Perry v. Brakefield*, 534 So. 2d 602 (Ala. 1988), we summarized *Robinson v. Kierce*, 513 So. 2d 1005 (Ala. 1987), and *Killingsworth v. Killingsworth*, 283 Ala. 345, 217 So. 2d 57 (1968), and the law of issue preservation as it relates to motion *in limine* practice. "The clear holding of these cases is that unless the trial court's ruling on the motion *in limine* is absolute or unconditional, the

ruling does not preserve the issue for [appellate review]." *Perry*, 534 So. 2d at 606. If the ruling is not absolute, proper objections at trial are necessary to preserve the issue. *Liberty Nat'l Life Ins. Co. v. Beasley*, 466 So. 2d 935, 936 (Ala. 1985). Because the trial court's ruling in the instant case was not absolute, and because several subsequent references to orange balls or markers were made without objection, we conclude that the propriety of the trial court's action is not before us.

VI.

The sixth issue raised by CAEC involves the trial court's granting of the plaintiff's motion *in limine* to exclude evidence of the plaintiff's decedent's violation of Code 1975, § 37-8-52, and the trial court's failure to charge the jury on the effect of that section. We address each contention separately.

A. Motion *in limine*

Plaintiff filed a motion *in limine* to exclude any testimony, argument, or other reference to § 37-8-52. We have searched the record and find no ruling on that motion whatsoever. We can not, then, put the trial court in error on this issue.

B. Jury charge

CAEC sought to have the jury charged on the effect of § 37-8-52, and, when the trial court failed to so charge, it interposed a general objection. "[N]ot only must an objection to the trial court's refusal to give an instruction be made, but the objection must be made specifically and must be supported by grounds in order for review to be [heard] in the appellate court." *Burnett v. Martin*, 405 So. 2d 23, 28 (Ala. 1981). The general objection in the case at bar, merely "to the court's failure to give written charge . . . 20," was inadequate to preserve this issue for review.

VII.

The final issue raised by CAEC involves remarks made by the plaintiff's lawyer in his closing argument.

At one point, the plaintiffs' lawyer argued:

> "I can stand here and tell you that when you are flying an airplane, and it starts to go down, worth 26 million dollars, they tell that pilot to jump out.
>
> ". . . .
>
> "Let's ring the bell of justice. Let's believe in this lady who just started out, finally, after three children, and then finally has an opportunity to enjoy life with her lifelong mate . . . ."

Without commenting on the propriety of these arguments, we note that the trial court sustained CAEC's objections, overruled its motion for a mistrial, and as to the latter argument, promptly instructed the jurors to "disregard that argument." We also note that, in its charge to the jury, the court instructed the jurors that the verdict must be based "on the law that I have given you and the evidence in this case," and that the "verdict can not be based on sympathy, bias, or prejudice."

Assuming, without deciding, that the arguments made were improper, we hold that the trial court's actions were sufficient to prevent prejudicial error. See *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249, 1254 (Ala. 1986).

Conclusion

Because we have found no reversible error in this case, the judgment of the trial court is due to be affirmed.

AFFIRMED.

Hornsby, C.J., and Jones, Shores, Adams, and Kennedy, JJ., concur.

Almon, J., concurs in the result.

Maddox, Houston, and Steagall, JJ., dissent.

Central Alabama Electric Cooperative v. Tapley

MADDOX, JUSTICE (Dissenting).

I cannot distinguish the facts of this case from those of *Watters v. Bucyrus-Erie Co.*, 537 So.2d 24 (Ala. 1989); therefore, I must respectfully dissent.

While I need not reach, in this case, the substantive due process issues concerning the award of punitive damages, I have previously addressed this question. See, my separate opinion in *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986), in which I concurred in part and dissented in part, and my concurring and dissenting opinion in *Industrial Chemical & Fiberglass Corp. v. Chandler*, [Ms. 86-381, 86-385, January 20, 1989], ___ So.2d ___ (Ala. 1989), in which I stated that I thought the "excessive fines" clauses of both the state and federal constitutions apply to punitive damages in civil cases. As I stated in Justice Houston's case of *Wilson v. Dukona Corp.*, [Ms. 86-1066, April 28, 1989] ___ So.2d ___ (Ala. 1989), I want to await the decision in the case of *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 845 F.2d 404 (2d Cir. 1988), cert. granted in part, ___ U.S. ___ , 109 S.Ct. 527 (No. 88-556, Dec. 5, 1988), before I write further on this issue.

Central Alabama Electric Cooperative v. Janice C. Tapley

HOUSTON, JUSTICE (dissenting).

I find it difficult not to concur with any opinion that cites *The Nature of the Judicial Process* (1921), for I have great respect for and stand in awe of the man who was the 75th United States Supreme Court Justice, Mr. Justice Benjamin N. Cardozo, and his judicious writings. However, I do not reach the substantive due process issue, for I

would reverse and remand on the issue of contributory negligence.[1]

The majority admits that the facts in this case are "somewhat similar to" those in *Watters v. Bucyrus-Erie Co.*, 537 So.2d 24 (Ala. 1989). I would say that I could not hold as the majority does without expressly overruling *Watters*. There is an overwhelming weight of evidence of contributory negligence.

The majority opinion recites the fact that the line with which Tapley's trailer dump came in contact had been erected by CAEC within a week of Tapley's death. The majority opinion omits to recite that Tapley knew that the line had been installed. Tapley helped install the line within the week before his death. This evidence is undisputed. Tapley and the driver with whom he normally drove discussed the location of the service pole to which the line was attached. Tapley, an experienced truck driver, had worked for the asphalt plant for approximately six years. He attended safety meetings at least twice a month, where the hazard of overhead power lines was regularly discussed. In addition, every truck or trailer in the operation, including Tapley's, had clearly visible warning labels:

"CAUTION

"STAY AT CONTROLS WHILE DUMPING AND LOWER BODY IMMEDIATELY IF BODY LEANS OR SHIFTS TO ONE SIDE WHILE DUMPING.

"PRIOR TO RAISING BODY, *CHECK TO BE SURE BODY WILL NOT CONTACT POWER LINES OR OTHER OBSTRUCTIONS WHEN IN THE UP POSITION.*" [Emphasis added.]

"CAUTION

"1. Improper operation of this unit can result

---

[1] In reference to the discussion in Section IV of the *per curiam* opinion, I readopt my reasoning in footnote 10 of my dissent in *Tatum v. Schering Corp.*, 523 So.2d 1042, 1060 (Ala.

in serious injury. Do not operate unless you have been properly instructed and are familiar with the operation of this unit.

". . . .

"7. Do not leave vehicle during dumping cycle. Remain at the controls. Release the tail gate controls before lifting the body.

". . . .

"11. *Never raise body where overhead obstructions may exist. Never raise body in proximity of power lines as serious injury may result.*" [Emphasis added.]

The accident happened at 7:45 A.M. The line was visible from directly underneath and for a distance of 100 to 200 yards. All of this evidence is undisputed. If any of this was disputed, it could be disregarded in favor of the contradictory evidence, in viewing the evidence most favorably to the winning side, but it is all undisputed; therefore, it must be considered in reviewing the trial court's refusal to grant CAEC's motions.

In its final order, the trial court stated that "[t]here was ample evidence upon which the jury could have found [Tapley] guilty of contributory negligence. . . ." I conclude that the facts were such that all reasonable people must draw the same conclusion—that Tapley was contributorily negligent; and, therefore, that Tapley was contributorily negligent as a matter of law. *Hatton v. Chem-Haulers, Inc.*, 393 So.2d 950 (Ala. 1980). This is consistent with this Court's holding in *Watters; Wilson v. Alabama Power Co.*, 495 So.2d 49 (Ala. 1986); *Quillen v. Quillen*, 388 So.2d 985 (Ala. 1980).

CAEC moved for a directed verdict as to the issue of contributory negligence at the end of all the evidence, arguing that it was entitled to a judgment as a matter of

law on the negligence count because of its affirmative defense of contributory negligence. CAEC also filed a motion for a judgment notwithstanding the verdict, in which it realleged that same ground. CAEC's motion for a directed verdict and motion for a judgment notwithstanding the verdict should have been granted on CAEC's affirmative defense of contributory negligence.

> "Where a defendant files a motion for directed verdict as to a count which is not supported by the evidence, detailing with specificity the grounds upon which the particular count is not supported by the evidence and the Court denies the motion, a general jury verdict will not be presumed to have been returned on a count which is supported by the evidence. *John Deere Industrial Equipment Co. v. Keller*, 431 So.2d 1155 (Ala. 1983); *Aspinwall v. Gowens*, 405 So.2d 134 (Ala. 1981)."

Russellville Production Credit Ass'n v. Frost, 484 So.2d 1084, 1087-88 (Ala. 1986); see also *C & S Financial Services v. Bradley*, 501 So.2d 1218 (Ala. 1987); *Mobile Dodge, Inc. v. Alford*, 487 So.2d 866 (Ala. 1986). I would reverse and remand for a new trial on wantonness.

I do not understand footnote eight of the *per curiam* opinion. Unless the majority of this Court is convinced that the *ratio decidendi* of the doctrine of contributory negligence would not " 'hypothetically be consented to today by the conscience and the feeling of justice of the majority of all those whose obedience is required by [that] rule of law,' " *Southern States Ford, Inc. v. Proctor*, [Ms. 87-331, March 10, 1989] ___ So.2d ___ (Ala. 1989) (Houston, J., concurring specially), then I would assume that this Court would follow the doctrine of *stare decisis*.

Steagall, J., concurs.

[R. 70]

APPENDIX F

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-87-448

MARTHA HOFFMANN SANDERS,
Mother of NORMA DAVISON HOFFMANN,
deceased minor,

Plaintiff

vs.

DEBBY D. CLARDY, et al.,

Defendants

AMENDED ANSWER OF DEFENDANT DEBBY D. CLARDY, IN HER REPRESENTATIVE CAPACITY AS EXECUTRIX OF THE ESTATE OF THOMAS EUGENE CLARDY AND CLARDY REALTY, INC.

Come now the defendants, Debby D. Clardy, in her representative capacity as Executrix of the Estate of Thomas Eugene Clardy and Clardy Realty, Inc., and amends their answer previously filed to include the following defenses.

1. Defendants say that the imposition of punitive damages against them under Alabama law violates their rights under the due process clauses of the Fourteenth Amendments to the Alabama and United States Constitutions.

2. Defendants say that the imposition of punitive damages against them under Alabama law violates the equal protection clauses of the Fourteenth Amendments to the Alabama and United States Constitutions.

3. Defendants say that the imposition of punitive damages against them under Alabama law violates the Excessive Fines Clauses of the Eighth Amendments to the Alabama and United States Constitutions.

[R. 71]

4. Defendants say that the imposition of purely punitive damages, jointly and severally, violates their rights under the due process clauses of the Fourteenth Amendments to the Alabama and United States Constitutions.

5. Defendants say that the imposition of purely punitive damages, jointly and severally, violates the Equal Protection Clauses of the Fourteenth Amendments to the Alabama and United States Constitutions.

6. Defendants say that the imposition of purely punitive damages, jointly and severally, violates the Excessive Fines Clause of the Eighth Amendments to the Alabama and United States Constitution.

/s/ Michael B. Beers
Michael B. Beers

/s/ Julian P. Hardy
Julian P. Hardy

ATTORNEYS FOR ABOVE-NAMED DEFENDANT

OF COUNSEL:

MILLER, BEERS & SMITH
P. O. Box 1461
138 Adams Avenue
Montgomery, Alabama 36104

PRITCHARD, McCALL & JONES
901 Brown Marx Tower
Birmingham, Alabama 35203

APPENDIX G

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-87-448

MARTHA HOFFMANN SANDERS, Mother of NORMA DAVISON HOFFMAN, deceased minor,

Plaintiff

vs.

DEBBY D. CLARDY, et al.,

Defendants

MOTION FOR DIRECTED VERDICT

Comes now the defendant, Clardy Realty, Inc., and requests this Honorable Court to enter a directed verdict in favor of Clardy Realty, Inc., on the ground that there is (1.) no evidence to sustain a verdict against Clardy Realty, Inc., (2.) Further, that the undisputed evidence is that Clardy Realty, Inc. did not come into existence until after the date of the accident referred to in the complaint, (3.) That the imposition of punitive damages, under Alabama law, is unconstitutional under the excessive fines, due process and equal protection clauses of the 8th and 14th amendments to the Alabama and United States Constitutions, (4.) That the imposition of punitive damages where the liability is joint and several is unconstitutional under the excessive fines, due process, and equal protection clauses of the 8th and 14th amendments to the Alabama and United States Constitutions.

/s/ Michael B. Beers
Michael B. Beers
/s/ Julian P. Hardy
Julian P. Hardy

ATTORNEYS FOR CLARDY REALTY, INC.

OF COUNSEL:

MILLER, BEERS, & SMITH
P. O. Box 1461
Montgomery, Alabama 36104

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered, in open Court, a copy of the above and foregoing Motion to all counsel to this lawsuit this 13th day of January, 1988.

/s/ Julian P. Hardy
OF COUNSEL

[RT. 511]

* * * * *

MR. HARDY: Your Honor, like I said, we're—ours is partially typed, partially written. [RT. 512] We're getting ready to submit it to the Court and we raise in our answer hereto the punitive damages, the constitutionality of it, particularly in this application, that issue. I assume it's the same ruling.

THE COURT: If you want to raise any additional grounds, you'd better state them now.

MR. HARDY: The grounds are those that we have set out in our amended answer, that we're incorporating in our motion.

THE COURT: Your amended answer and what you've told me here in court, but I can't consider what I haven't ever seen.

MR. HARDY: Well, it's in the court file.

THE COURT: I understand, but in case you have a motion that you haven't filed, or something.

MR. HARDY: Well, before I made my argument, I told them in due of the fact that Richard was closing quickly, we're right now concluding our motions.

THE COURT: Do you have any additional grounds or any motions that you're typing?

MR. HARDY: Yes, sir, and that has just been argued, or mentioned by Mr. Braswell and Mr. Wilson.

[RT. 513]

THE COURT: The constitutionality of punitive damages?

MR. HARDY: Well, let me be specific: Number one . . .

THE COURT: What I'm saying, you can't blindside me and say I overruled a motion that I never saw.

MR. HARDY: That's what I'm trying to say. Number one, we challenge the constitutionality under the due process clause of the 14th Amendment to Alabama and Federal Constitutions, equal protection clauses of the 14th Amendment to Alabama and Federal Constitutions, and the excessive fines clauses for both Constitutions.

We challenge both punitive damages, generally, in Alabama, because of the lack of any adequate guidelines about their imposition. But number two, under those same three constitutional provisions, State and Federal, we challenge the constitutionality in this state of the imposition of punitive damages, jointly and severally without any importionment, because it seems to me that the arbitrariness and the unfairness of punitive damages, [RT. 514] generally, in Alabama, is only compounded when they are imposed jointly and severally.

THE COURT: I understand. The law is, as y'all have argued, I don't think it's a fair law, the joint and several liability, but I'm not in the job of making the law.

MR. HARDY: Yes, sir. We just want to make the record clear, and we say particularly is joint and several liability unfair when the only damage are purely punitive. We say, in that case, it seems to us it's even more fundamentally unfair than the case where the damages are compensatory, because the damages are in the nature of punishing someone for someone else's conduct.

THE COURT: I deny your motion, even though I agree with you.

* * * * *

APPENDIX H

[R. 85]

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-87-448

MARTHA HOFFMANN SANDERS, Mother of NORMA DAVISON HOFFMANN, deceased minor,

Plaintiff

vs.

DEBBY D. CLARDY, et al.,

Defendants

MOTION FOR DIRECTED VERDICT

(AT THE CLOSE OF ALL TESTIMONY)

Comes now the defendant, Clardy Realty, Inc., and requests this Honorable Court to enter a directed verdict in favor of Clardy Realty, Inc., on the following grounds:

1. There is no evidence to sustain a verdict against Clardy Realty, Inc.

2. Further, that the undisputed evidence is that Clardy Realty, Inc., did not come into existence until after the date of the accident referred to in the complaint.

3. That the imposition of punitive damages, under Alabama law, is unconstitutional under the excessive fines clauses of the 8th Amendments, and due process and equal protection clauses of the 14th Amendments ot the Alabama and United States Constitutions.

[R. 86]

4. That the imposition of purely punitive damages where the liability is joint and several is unconstitutional under the excessive fines clauses of the 8th Amendments, and due process, and equal protection clauses of the 14th Amendments to the Alabama and United States Constitution.

/s/ Michael B. Beers
Michael B. Beers
/s/ Julian P. Hardy
Julian P. Hardy

ATTORNEYS FOR DEFENDANT,
CLARDY REALTY, INC.

OF COUNSEL:

MILLER, BEERS & SMITH
P. O. Box 1461
Montgomery, Alabama 36102

PRTICHARD, McCALL & JONES
901 Brown Marx Tower
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered, in open Court, a copy of the above and foregoing Motion to all counsel to this lawsuit this 13th day of January, 1988.

/s/ Julian P. Hardy
OF COUNSEL

[RT. 707]

* * * * *

THE COURT: Are you resting now?

MR. BEERS: Yes, sir; we're resting.

THE COURT: Are there any motions?

MR. BEERS: Clardy Realty, as well as Debby Clardy in her representative capacity as executrix of the Estate of Eugene Clardy, we're going to wait until the end of all the evidence.

MR. BRASWELL: You want our first witness?

THE COURT: I'm asking have you got any motions now?

MR. BEERS: Can't we just do it at the end of all the evidence?

MR. BRASWELL: Judge, do you want us to make our last directed verdict?

[RT. 802]

* * * * *

MR. BEERS: At this time, we refile our motion for directed verdict, setting forth those same issues that we have addressed with regards to Clardy Realty, Incorporated, and we emphasize to the Court that during the Defendants' statement of the case, that it was even more clarified as to the lack of sintilla of evidence that Mr. Clardy was on business at the time of this accident.

THE COURT: Your motion is also denied.

* * * * *

APPENDIX I

[R. 183]

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV 87-448-G

MARTHA HOFFMAN SANDERS etc.

Plaintiff

v.

DEBBY D. CLARDY et al

Defendants

BRIEF IN SUPPORT OF MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO OR ALTERNATIVELY NEW TRIAL

Defendants Debby D. Clary as Executrix of the Estate of Thomas Eugene Clardy and Clardy Realty, Inc. have previously filed their motion for judgment non obstante veredicto or alternatively for new trial. This brief is offered in support of that motion. Numerous grounds are stated in support of the motion previously filed. In the interest of brevity, not all of those grounds will be addressed in this brief. However, the defendants do not waive any of the grounds stated in said motion.

* * * * *

[R.190]

IV. The punitive damage award violates the due process clause of the Fourteenth Amendment and excessive fines clause of the Eighth Amendment, as well as Article 1, §§ 6 and 13 of the Alabama Constitution.

The Supreme Court of the United States recently recognized the importance of the constitutional concerns raised

by the imposition of unlimited punitive damage awards. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986), that Court declared that the argument that the "lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause . . . raise[s] [an] important issue[ ] which . . . must be resolved . . . ." The question whether the subjection of defendants to unlimited monetary punishment violates the Due Process Clause or Excessive Fines clause is currently before that Court in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765 (argued Nov. 30, 1987). Similar questions are also currently pending before the Supreme Court of Alabama in *Industrial Chemical & Fiberglass Corp. v. Chandler*, No. 86-381, a wrongful death action involving a $5,000,000 punitive damage judgment. The Alabama Supreme Court heard oral argument in that case on October 20, 1987. The dispositions of *Bankers Life* and *Industrial Chemical* will bear heavily on the ultimate resolution of the instant challenge to the $2,750,000 punitive award returned by the jury. If either case is decided prior to [R. 191] a decision on the defendants' post-trial motion, counsel will notify the court as soon as possible.

The Supreme Court of Alabama has made clear that punitive damages are awarded to serve the governmental function of punishing conduct perceived as antisocial in order to achieve the twin goals of retribution and deterrrrence. *Deaton, Inc. v. Burroughs*, 456 So. 2d 771, 776 (Ala. 1984); *Nettles v. Bishop*, 289 Ala. 100, 266 So. 2d 260, 262 (1970). The wrongful death of a minor statute authorizes the imposition of an unlimited punitive damage award for any negligent act causing the death of a minor child. Ala. Code §6-5-391 (1975). The Supreme Court of Alabama has consistently held that the damages recoverable under §6-5-391 are purely punitive in nature, with no compensatory or actual damages component. *See, e.g., Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354, 356 (1974). The jury was so instructed in this case, over the

objection of defendants. (TR pp. 853-54, 868-870, 873-74, 885-87).

Subjection of the defendants to such unlimited fines constitutes arbitrary and capricious punishment which is inconsistent with constitutiional restrictions embodied in the Due Process Clause and the Excessive Fines Clause of the United States Constitution, as well as their counterparts in the Alabama Constitution, Art. I, §§6 and 15.

[R. 192]

A. Section 6-5-391 of The Alabama Code is unconstitutional on its face and as applied in this case because it fails to limit the maximum size of punitive damage awards which it authorizes.

The judicial imposition of punitive fines, including punitive damages, is subject to traditional standards of due process. In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the Supreme Court struck down, under the Due Process Clause of the Fourteenth Amendment, a state statute authorizing a jury to award court costs against the defendant without any guidelines. The Court condemned the statute as "leav[ing] to the jury such broad and unlimited power in imposing costs. . . that the jurors must make determinations of the crucial issue on their own notions of what the law should be . . . ." 382 U.S. at 403. The Supreme Court's Due Process Clause analysis focused on the position that statutes cannot constitutionally leave to a jury the unfettered power to impose financial sanctions, whether labelled "civil" or "criminal," in an arbitrary fashion.

Section 6-5-391 of the Alabama Code authorizes a plaintiff to recover punitive damages in any amount "as the jury may access," Ala. Code §6-5-391, without any guidelines. *See Eich v. Town of Gulf Shores*, 300 So. 2d at 356. Section 6-5-391 therefore violates the Due Process Clause of the Fourteenth Amendment and Article I, §6 of the Alabama Constitution because of the lack of any pre-

established limit on the amount of punitive damages which a jury may impose.

* * * * *

[R. 194]

C. The indiscriminate imposition of joint punitive damage awards against each defendant without regard to culpability violates the Due Process and Excessive Fines Clauses.

The jury in this case was instructed, over defendants' objections, that if they were to find for plaintiffs, a single punitive damages award should be imposed on all defendants. (TR pp. 836-37, 852, 870). Constitutional considerations, however, required the jury to apportion any punitive damages among the defendants according to each defendant's level of culpability.

Due process prohibits granting juries the unfettered power to impose financial sanctions in an arbitrary fashion. *Giacco v. Pennsylvania*, 382 U.S. at 403. Similarly, the Excessive Fines Clause of the United States and Alabama Constitutions prohibits the imposition of fines, whether labelled "civil" or "criminal," that are disproportionate to the offense in question. By prohibiting the jury from considering the varying degrees of culpability of the various defendants, the court's instruction required the jurors to impose a single punitive damages award against all defendants, with each being jointly and severally liable for the entire award. The imposition of punitive damages in such a manner was clearly arbitrary and [R. 195] prevented the jury from imposing punitive damages that were proportionate in amount to the culpability of each defendant. Consequently the $2,750,000 fine in this case violates the Due Process and Excessive Fines clauses, entitling defendants to JNOV or, in the alternative, a new

trial in which the jury is instructed to apportion any punitive damages it may award.

* * * * *

APPENDIX J

STATE OF ALABAMA
IN THE CIRCUIT COURT
FOR THE COUNTY OF MONTGOMERY
FIFTEENTH JUDICIAL CIRCUIT
CIVIL

CIVIL ACTION NO. CV-87-448-G

DEBBY D. CLARDY, in her representative capacity as Executrix of the estate of Thomas Eugene Clardy; CLARDY REALTY, INC.,

APPELLANT,

VS.

MARTHA HOFFMAN SANDERS, Mother of NORA DAVIDSON HOFFMAN, deceased minor,

APPELLEE.

* * * * *

BEFORE: The HONORABLE JAMES T. GULLAGE, Judge presiding, in Courtroom Number Three of the Lee County Justice Center, at Opelika, Alabama, on the 31st day of March, 1988, beginning at approximately 9:45 AM, and being concluded at approximately 12:05 PM on the same date.

* * * * *

APPEARANCES:
FOR THE APPELLANT: MICHAEL B. BEERS, Esq.,
Attorney at Law
Montgomery, Alabama, and
JULIAN P. HARDY, Esq.,
Attorney at Law

Birmingham, Alabama

FOR THE APPELLEE: RICHARD M. JORDAN, Esq.,
and
RANDLE AL MYERS, Esq.,
Attorneys at Law
Montgomery, Alabama

Julian P. Hardy, Esq.
Attorney at Law
Birmingham, Alabama

* * * * *

with respond et superior, scope of employment on business and for the same reasons we've argued that there should be JNOV for Clardy Realty, Inc., we say that this charge obviously should not have been given those three charges. These are plaintiff's requested charges, 25, 26 and 27.

THE COURT: Okay.

MR. HARDY: The other issue, legal issue, we would like to take up at this time and I will not spend an awful long time on it, Your Honor, is the constitutional issue. You have—the Court has expressed its feelings about that throughout the trial at each juncture when that was raised.

THE COURT: Yeah. I remember that issue.

MR. HARDY: And my recollection—well, I won't try to say what my recollection is of the Court's feelings—

THE COURT: I'll put it on the record here, and I don't think that I am in a position to decide that that is unconstitutional.

MR. HARDY: Yes, sir. But if I could just briefly, I would like to get in the record.

THE COURT: Well, y'all argued that from the very first.

MR. HARDY: I would like to just briefly point out to the Court, and for the record, and the Court, I feel certain, is aware and probably has had argued to it before, *Aetna v. Lavoie* in 1986. The United States Supreme Court said, and there was a 3-1/2 million dollar verdict in Mobile and—

THE COURT: Talking about excessive fines is unconstitutional, is what you're arguing. Correct?

MR. HARDY: Well, due process and excessive fine, but the United States Supreme Court even though they decided this case on a different grounds saying Justice Emory

should have recused himself from hearing the case, specifically noted *Aetna's* argument was that the lack of standards governing punitive damage awards in Alabama violate the due process clause raises an important issue which must be resolved. They decided that case on another ground, but obviously felt that was an important enough issue and had enough concern about it to make that statement. I would only point out to the Court that that issue is now before the Supreme Court.

Bankers Life and Casualty Co. v. Crenshaw was argued in the United States Supreme Court back in November of '87. It is presently under submission, and an opinion, an issue will be forth coming, I don't know exactly when; but the case has been under submission for that amount of time. In the Alabama Supreme Court the identical issue that we have raised throughout this trial is now pending in several cases, but in one case, in particular, I know *Industrial Chemical & Fiberglass Corp. v. Chandler,* which the Alabama Supreme Court has been holding since October of '87, the month before *Bankers Life* was argued in the United States Supreme Court, it's a wrongful death action involving a five million dollar punitive damage judgment. The constitutional issues have been raised by both excessive fines under the state and United States constitution, as well as the due process. It may be that also, I don't know if equal protection was raised in *Industrial Chemical* or not. We also raise that third constitutional ground in Clardy, in this case. For the Court's information, I would also just point out that this issue has recently as last week worked its way through the Georgia courts, and, in a case styled—released just this month, March of '88, *Colonial Pipe Line Co. v. Brown*—I don't know whether you have this decision yet or not, Your Honor. I'm informed that you do.

THE COURT: Somebody sent me a copy of—a xeroxed copy of an opinion of the Georgia court. But I don't know whether that is the same opinion or not.

MR. BEERS: I sent that, Your Honor.

MR. HARDY: Well, it's *Colonial Pipe Line Co. v. Brown* where the issue finally was heard and decided by the Georgia Supreme Court. In that case there had been a fifty-two thousand dollar judgment at the trial court level for actual damages and a five million dollar punitive damage award.

THE COURT: Is this about the tractor running over the pipeline and this—

MR. HARDY: Yes, sir. That's correct. That's correct. The—apparently the defendant's in this case from reading the opinion raised both the constitutional issues involved in excessive fines clause of the 8th amendment and the—

THE COURT: Okay. Let me ask you a question there.

MR. HARDY: Yes, sir.

THE COURT: Georgia's statute for wrongful death is not punitive in nature, though it is compensatory, isn't it?

MR. HARDY: That's my understanding.

THE COURT: Well, this case involved personal injury in which they applied large punitive damage.

MR. HARDY: This is a property damage case here.

THE COURT: Yes, sir.

MR. HARDY: This is property.

THE COURT: The excess—the amount wasn't it for injury to the guy—well, the tractor burned up I guess.

MR. HARDY: My understanding this was strictly a property damage case from reading of the case. But whether it was property damage or personal injury, the constitutional argument is the same in both cases.

THE COURT: Yeah. I understand.

MR. HARDY: And in this case the defendant challenged the punitive damage award under the excessive fines clause of the 8th Admendment of the United States Constitution, as well as apparently Georgia State Constitution, as does Alabama have a similar provision. They also raised the due process argument but Georgia Supreme Court, because of its ruling and decision based upon the excessive fines argument did not reach the due process. In any event, on the constitutional issues the Georgia Supreme Court now has reversed the five million dollar punitive damage award based on the same constitutional issue that we raised in this case. That *Aetna* raised before the Supreme Court in '86, that *Bankers Life and Casualty Co.* has argued before the United States Supreme Court, and that several other defendants have argued, and now it is pending before the Alabama Supreme Court. I do not know, frankly, in looking at the *Brown* decision; although the Court went off on excessive fines, I don't know what the Court anticipated would be the further proceedings in this case. I suppose if it had been decided in the due process clause that punitive damages were, in fact, violation of the due process clause it may have reduced the punitive damages to zero, and I don't know if under Georgia Law they would have had any other vehicle for religating or pursuing that. Under the excessive fines clause where they have decided evidently the Georgia Supreme Court decided that it may be left open for them to religate the amount of damages. I just do not know, but in any event the punitive damage award was reversed on the constitutional issue. Again, I understand the Court has expressed his feelings about its position regarding this issue. If there are any other specific questions about the constitutionality of the punitive damages in Alabama, and under the Alabama death statute which the Alabama Supreme Court has said—

THE COURT: As I understand the law now, the present decisions of the Alabama Appellate Court is that that law is constitutional. I don't have any—you can't cite me a

case anywhere that says it is unconstitutional other than the Georgia case, can you?

MR. HARDY: I don't know that they say it is constitutional.

THE COURT: Well, I mean it is been the way that Alabama has proceeded for the last hundred years or—

MR. HARDY: That's whats pending right now. Whether it is constitutional.

THE COURT: Yeah. Surely.

MR. HARDY: I would just mention that in the case Mr. Jordan mentioned in his letter yesterday, March 30, 1988, *Blackbelt Wood Company v. Sessions*, he cites it on the issues of excessiveness apportionment of damages. That was a three and a half million dollar punitive damage award death case. Of course, there's a big difference in *Blackbelt*. I mean, as I recall, they were two corporate defendants and one individual defendant, where there was no JNOV in that case, for the corporate defendant to the three and a half million dollar verdict; and leaving it intact against individuals. That case is certainly no authority, or certainly is easily distinguishable on that basis, in terms of the size of the verdict and the fact that it was not cut in that case apparently by Judge Hughes in Jefferson County. If you read the testimony in that case from Judge Hughes on rehearing in *Hammond*, evidently there was no evidence really put on by the defendant in that case, with regard to the *Hammond* criteria concerning excessiveness of the verdict—

MR. BEERS: Your Honor, if I could interrupt Pat, at this moment, and answer to your last inquiry as to whether or not we can point you to a case where the Alabama Supreme Court has held the death statute unconstitutional, I would only alert the Court that the Alabama Supreme Court has never had the opportunity to rule on it with regard to these constitutional issues.

THE COURT: Okay. But the matter is apparently presently pending.

MR. HARDY: That's what I say. It is presently pending, Your Honor. That's as I've stated in any number of cases, but in a similar wrongful death case five million dollar—the *Chandler* decision. But the *Blackbelt Wood Company* case also, I think, points out the defendant never raised the constitutionality of the punitive damage award in that case. Never raises it. Obviously, it is not addressed; but again, in terms of excessiveness Mr. Jordan says that a case where there is an award against corporate individual defendants that it was properly submitted to the jury with respect to all of those as authority in dispositive of the possibility that this case could be excessive, if you assume the corporation should not have been submitted to the jury. I think thats that's reaching.

THE COURT: Okay. You want to answer that?

MR. JORDAN: Well, the very essence of *Blackbelt* was it was just simply unfair. The *Blackbelt* to have to pay to be jointly liable for this big judgment when they had gotten out of the first trial and even the judgment in the first case wasn't but two hundred and fifty thousand dollars. They took a forty page opinion to trace the death action all the way back to 1852 and brought it all the way forward. They specifically refused to adopt the concept of apportionable damages. I don't think they understand that in that case everybody was found guilty, just like here. They had individual defendants' trial, they had the trucking company, they had the company that loaded it; that's the whole purpose for joint and severable liability. They could vest that judgment of three and a half million dollars upon the truck driver, if they so choose; so, as to excessiveness, they followed the letter of the law on *Hammond* that unless you can predicate—unless that trial judge can find a specific finding that that judgment was corrupt, that it was tained by bias, prejudice, passion or other miscon-

duct, it constitutionally must be maintained in its integrity. You can't just substitute your opinion for those. *Blackbelt* is the leading case, in my opinion, and it is less than a year old; and for them to say that its distinguishable all I say is this—if the rule is really the enormity of the wrong, the wrong in *Blackbelt* is paled in comparison to the wrong in the Clardy case.

MR. HARDY: Just one other point, Your Honor. Mr. Jordan was using the term loosely—constitutional; there is no constitutional issue raised in *Blackbelt*. He said something about the verdict and the damage or constitutional. That issue has not been decided—

MR. JORDAN: Well, I said the verdict has constitutional protection. That's a constitutional provision.

THE COURT: Okay. That's fine. Go ahead.

MR. HARDY: All right, sir. Of course, the difference Mr. Jordan doesn't seem to want to give me any slack on is that in *Blackbelt* there was a verdict against all of the defendants. I concede there was, and he said in this case there was a verdict against all of the defendants. I concede that too.

APPENDIX K

IN THE SUPREME COURT OF ALABAMA

NO. 87-1070

DEBBY D. CLARDY, as the Executrix of the Estate of Thomas Eugene Clardy, deceased, and CLARDY REALTY, INC.,

Appellants,

vs.

MARTHA HOFFMAN SANDERS,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

Of Counsel:

Beers, Anderson, Jackson & Smith, P.C.
272 Commerce St.,
Suite 210
Montgomery, AL 36104
(205) 834-5311

Michael B. Beers
Julian P. Hardy
Karon O. Bowdre
Deborah Alley Smith

ATTORNEYS FOR APPELLANTS

Pritchard, McCall, Jones,
Spencer & O'Kelley
901 Brown Marx Tower
Birmingham, AL 35203

Rives & Peterson
1700 Financial Center
Birmingham, AL 35203
(205) 328-8141

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III.

THE $2,750,000 PUNITIVE DAMAGE AWARD IMPOSED IN THIS CASE IS FUNDAMENTALLY OFFENSIVE TO GUARANTEES CONTAINED IN THE ALABAMA AND UNITED STATES CONSTITUTIONS

Alabama's Constitution and the Constitution of the United States both provide that no individual shall be deprived of property without due process of law, and that excessive fines shall not be imposed. Ala. Const. of 1901, Art. 1, §§ 6, 15; U.S. Const., Fifth Amendment, Eighth Amendment, Fourteenth Amendment. These provisions were violated in this case by the authority granted to and exercised by the jury to award punitive damages, to impose a fine to punish and deter, without *any* legislatively determined or judicially articulated clear standards as to whether a fine was warranted or the amount of or limits of any such punishment.[3]

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[3] Defendants first raised these constitutional challenges to the imposition of any punitive damages in this case in their Amended Answer. They reiterated these challenges at the charge conference and repeated them in their Motion For Directed Verdict. Defendants continued their constitutional objectives after the court had charged the jury and, after the jury's verdict, raised them once again in Defendants' Motion for JNOV or, in the Alternative, Motion for New Trial. *See supra*, pp. 2-4.

[30] The Supreme Court of the United States has expressed concern that the standards governing punitive damage awards are often "ill-defined." *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 780, n.4 (1985) (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J. dissenting). In 1986, the Court expressly stated that this absence of standards raised "important [constitutional] issues which, in an appropriate setting, must be resolved. . . ." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986). And only recently, Justice O'Connor, joined by Justice Scalia, observed at greater length that the power of the juries "to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state . . . may violate the Due Process Clause." *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1655 (1988) (O'Connor, J., concurring in part and concurring in the judgment).

These constitutional concerns arise from the unique qualities of punitive damages in our legal system. This Court has made clear that punitive damages are awarded to serve the [31] governmental function of punishing conduct perceived as antisocial in order to achieve the twin goals of retribution and deterrence. *Tatum v. Schering Corp.*, 523 So. 2d 1042, 1044 (Ala. 1988); *City Bank of Alabama v. Eskridge*, 521 So. 2d 931, 933 (Ala. 1988); *Fruehauf Corp. v. Welch*, 519 So. 2d 502, 506 (Ala. 1988); *Deaton, Inc. v. Burroughs*, 456 So. 2d 771, 776 (Ala. 1984). Instead of supplying the jury with standards to guide the determination whether to impose punitive damages, § 6-5-391 of the Alabama Code, pursuant to which the $2,750,000 punitive damage award in this case was imposed, authorizes the imposition of an unlimited, punitive award for *any* negligent act causing the death of a minor child. Ala. Code § 6-5-391 (1986). This Court has consistently held that the damages recoverable under § 6-5-391 are purely punitive in nature, with no compensatory or actual damages com-

ponent. *See, e.g., Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354, 356 (1974). The jury was so instructed in this case, notwithstanding defendants' objection to this jury charge on the grounds that Alabama's system for imposing punitive damages is unconstitutional. (RT. 853-54, 868-870, 873-74, 885-87). Damages under § 6-5-391 do not differ in this regard from damages under Alabama's Wrongful Death Act, which are also purely punitive. *See Consolidated Freightways, Inc. v. Pacheco-Rivera*, 524 So. 2d 346, 352 (Ala. 1988); *Tatum*, 523 So. 2d at 1045; *Deaton*, 456 So. 2d at 776.

[32] **A. The Punitive Damage Award Resulted from a Standardless Exercise of Arbitrary Power That Violated Defendants' Rights to Due Process Under the Alabama and Federal Constitutions**

The standards governing the award in this case were not merely ill-defined, they were virtually undefined. Section 6-5-391 authorizes a plaintiff to recover punitive damages in any amount "as the jury may assess" for any "wrongful act, omission or negligence" resulting in the death of a minor. Thus, there were *no* articulated standards of conduct, beyond the avoidance of ordinary negligence, which defendants could have followed in order to avoid the imposition of punitive damages. (The "negligence" and "wrongfulness" standards found in the statute add nothing to the common law duty of reasonable care to which all members of society are required to conform.) The damage award in this case therefore violated the Due Process Clause of the Fourteenth Amendment as interpreted by the Supreme Court in cases such as *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

In *Giaccio*, the Court struck down under the Due Process Clause a Pennsylvania statute under which a jury, having acquitted a criminal defendant, was authorized to award court costs against the defendant. The Court condemned the statute as "leav[ing] to the jury such broad

and unlimited power in imposing costs . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be . . . ." 382 U.S. at 403. The Court held that a system which imposed *punishments* based upon *"loose* [33] *and unlimiting terms"* would certainly "fail to measure up to the requirements of the Due Process Clause." 382 U.S. at 404 (emphasis added). Similarly, Justice O'Connor has recently observed that where a state authorizes a system by which "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury," this amounts to a "grant of wholly standardless discretion to determine the severity of punishment [which] appears inconsistent with due process." *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. at 1656 (O'Connor, J.) (internal quotation marks omitted). In reaching this conclusion, Justice O'Connor noted that punitive damages, like criminal punishments, are imposed to punish and deter, 108 S. Ct. at 1655, and that the Court had previously recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." 108 S. Ct. at 1656, *quoting United States v. Batchelder*, 442 U.S. 114, 123 (1979).

The imposition of a $2,750,000 punitive fine by the jury in this case simply cannot withstand scrutiny under the foregoing due process standards.

B. The Subjection of Defendants to Unlimited Monetary Punishment under Ala. Code § 6-5-391 Is Fundamentally Offensive to Concepts of Due Process Embodied in the Due Process Clauses of the Alabama and United States Constitutions

As appellants demonstrate below in part III. C., the functional equivalents of modern-day punitive damage [34] awards—amercements and fines—arose within the context of the English legal system under which the maximum

potential penalty was generally known in advance, having been established by local rule, custom, or statute. This fundamental principle—that limits on punishments must be prescribed in advance of their imposition and that such limits may not be set by juries on an *ad hoc* and *post hoc* basis—has roots in the ancient Latin canon, "Nullum crimen, nulla poena, sine lege," the modern translation of which is: "there can be no crime, *and no punishment*, except as the law prescribes it." M. Frankel, *Criminal Sentences* 3 (1972) (emphasis in original). The bed rock principle that the crime and the punishment must be prescribed and known has led to the codification of the criminal law and the rejection of the concept of common law crimes in this country.[4] Indeed, at and around the time of the ratification of the Fourteenth Amendment in 1868, the several States had already enacted comprehensive penal codes which supplanted the notion of the [35] common law crime. When these codes imposed monetary punishment, they typically did so by way of specified maximum fines.[5]

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[4] The concept of common law crime at the federal level had been rejected by the Supreme Court early in the 19th Century, the Court stating that prior to prosecution of a federal offense, Congress "must first make an act a crime [and] affix a punishment to it . . . ." *United States v. Hudson*,11 U.S. (7 Cranch) 31, 34 (1812).

Aside from the punitive damages system, the only context in which punishment is still administered in our judicial system in the absence of pre-established limits is in connection with the courts' exercise of their inherent contempt power. The Alabama legislature, recognizing the dangers posed by limitless judicial power, has limited the maximum fine that a Circuit Court may impose for criminal contempt to $100. Ala. Code § 12-11-30(5) (1986).

[5] In enacting such comprehensive penal codes, the States rejected the notion of open-ended, potentially unlimited punishments. The codification of criminal offenses with fixed maximum punishments throughout the States at and around the time of the ratification of the Fourteenth Amendment demonstrates the depth and breadth of the consensus among the several States on this question. *See, e.g.*, Ala. Penal Code chs. 1-10 (1866) (punishing variety of offenses, including forgery, coun-

The virtually complete rejection in this country of the potential for unlimited, jury-imposed fines in criminal cases supports a similar rejection under Article I, § 6 of the Alabama Constitution and the Due Process Clause of the Federal Constitution of unlimited, jury-imposed punitive fines in civil cases[6] because no principled constitutional distinction may [36] be drawn between fines which are imposed to punish and deter based upon whether they are labeled "criminal" or "civil." The protection of the Due Process Clause "is not to be avoided by the simple label the State chooses to fasten on its conduct or its statute." *Giaccio v. Pennsylvania*, 382 U.S. at 402.

Notwithstanding the Due Process violation posed by the imposition of potentially unlimited punitive damage awards. such awards generally escaped scrutiny under the Due Process Clause during the 19th Century. This occurred because the rationales that supported punitive damages were as yet murky and confused during that period. Pu-

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terfeiting, larceny, embezzlement, murder, robbery, burglary, and arson); *see id.* §§ 91, 92, 101, 102, 104-110, 118, 123, 129, 130, 135, 136, 138, 140, 144, 148, 153-155, 157-159, 162, 177-184, 186-190, 192-207 (imposing maximum fines for a variety of offenses). A listing of similar statutes of other States is included as an Addendum at the conclusion of this brief.

[6] If States were constitutionally free to allow juries to impose unlimited punishments on persons convicted of crimes, the Ex Post Facto Clause, Art. I, §10, cl. 1, as it applies to the sentencing of criminal offenders, would be emasculated. As illustrated by the Supreme Court's unanimous decision in *Miller v. Florida*, 107 S. Ct. 2446 (1987), the Court has assumed, at least since its decision in *Calder v. Bull*, 3 Dall. 386 (1798), that no person could be punished for the commission of an offense deemed "criminal" unless an upper limit on the punishment had been announced prior to the commission of the acts leading to conviction. And although the Ex Post Facto Clause generally applies only to legislatively imposed punishments, the Supreme Court has not hesitated to invoke the Due Process Clause of the Fourteenth Amendment to strike down criminal convictions obtained as the result of judicial action broadening the statutory definition of a crime. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964).

nitive damages were alternately viewed as a component of compensatory damages, as extra-compensatory, or as simultaneously compensatory and punitive. This ambiguity had the effect of discouraging or even foreclosing any meaningful analysis of the constitutionality of punitive damages.

The term "exemplary damages" was first used in the case of *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763). In *Huckle*, the jury had awarded 300 pounds in damages against a magistrate found to have falsely imprisoned the plaintiff. Although the court evaluated actual damages at no more than 20 pounds, it refused to set aside the verdict. The court reasoned that the jury's award must have been based on the spectre of "a magistrate over all the King's subjects, exercising arbitrary power . . . , " 2 Wils. K.B. at 207, 95 Eng. Rep. at 769, and the corresponding need to control such behavior through the imposition of a large judgment.

[37] In refusing to reduce the award, the court in *Huckle* assumed that it had very little, if any, authority to second guess the size of the jury's verdict, treating the jury's award as a verdict for actual damages and observing "that it is very dangerous for the Judges to intermeddle in damages for torts." 2 Wils. K.B. at 207, 95 Eng. Rep. at 769.[7] This assumption is consistent with the limitation on excessive amercements (fines) in Magna Carta because those limitations were not believed applicable to amercements or punitive fines imposed on "those who have administration of justice . . . ." *Griesley's Case*, 8 Co. Rep. 38a, 40a, 77 Eng. Rep. 530, 534 (C.P. 1588).

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[7] In the late 19th Century, it was observed that the reasoning of the early "exemplary" damage cases in England and the United States "amount[ed] to no more than a refusal to set aside" the large awards being returned by juries which could not be explained solely by reference to what "actual" damages had been sustained by the plaintiff. W. Hale, *Handbook on the Law of Damages* §§ 87-88, at 302 (2d ed. 1912).

"Exemplary" damages were extended after *Huckle v. Money* beyond cases involving government officials to deter individuals from seeking personal revenge for a wrong done to them by other private persons. *See Merest v. Harvey*, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814); *Grey v. Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764). Initially, the reasoning offered by the English courts to justify their allowance of "exemplary" or punitive damages payable to plaintiffs who had been wronged by other private persons was confused. Sometimes this practice was explained in terms of compensation for [38] "intangible wrongs." *See, e.g., Tullidge v. Wade*, 3 Wils. K.B. 18, 95 Eng. Rep. 909 (C.P. 1769) ("public" nature of tort occasioned greater actual damages). Such non-punitive rationales gradually faded in the 19th Century as English courts expanded the content of "actual" damages to comprehend "intangible" harm such as emotional distress. *See, e.g., Andrews v. Askey*, 8 Car. & P. 7, 173 Eng. Rep. 376 (C.P. 1837).

The result of the expansion of actual damages to include recovery for pain, distress, emotional suffering and the like was to remove the initial "compensatory" rationales for punitive damages. This in turn led to the courts' recognition that the *only* remaining justifications for verdicts in excess of actual damages suffered by the plaintiff were punishment and deterrence—the precise rationale under which amercements had been justified in the English legal system.

The purely "punitive" purposes of punitive damage awards gradually began to be recognized in the United States only in the 1860s. In the early and middle portions of the 19th Century, American "punitive damage" cases were plagued by the same ambiguity that characterized the British cases of that era. Some decisions apparently deemed punitive damages to be purely compensatory, designed to compensate plaintiffs for intangible, non-pecuniary losses, while others concluded that [39] punitive

damages were both punitive and compensatory.[8] Beginning largely in the 1860s and 1870s, courts began to view punitive damage awards as solely punitive.[9] This development resulted from the gradual expansion in the United States (as in England) of the concept of actual damages to include compensation for intangible injuries such as mental anguish, leaving "nothing for 'exemplary damages,' as formerly understood, to operate upon . . . ." *Fay v. Parker*, 53 N.H. at 384. Thus, "exemplary" damages came to be understood "to refer to criminal punishment for the sake of public example . . .," *id.*, or as "punishment, and to preserve the public tranquility." *Hawk v. Ridgway*, 33 Ill. 473, 475 (1864).

As a result of these shifting, inconsistent characterizations of punitive damage awards, litigants appear not to have argued that such unlimited awards are constitutionally unacceptable punishments. *See, e.g., Chiles* [40] *v. Drake*, 59 Ky. 146 (1859) (concluding that punitive damage awards do not violate constitutional guarantees against double jeopardy because punitive damages are compensatory as well as punitive); *Parker v. Mise*, 27 Ala. 480, 483 (1855); *Dearing v. Moore*, 26 Ala. 586, 589 (1855); *but see Fay v. Parker*, 53 N.H. 342 (1872) (holding punitive dam-

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[8] *See, e.g., Slater v. Sherman*, 68 Ky. (5 Bush) 206 (1868); *Freidenheit v. Edmundson*, 36 Mo. 226 (1865); *Ellsworth v. Potter*, 41 Vt. 688 (1869); *Carey v. Bright*, 58 Pa. 70 (1868); *Chiles v. Drake*, 59 Ky. 146 (1859); *Austin v. Wilson*, 4 Cush. 273 (Mass. 1849); *Davidson v. Goodall*, 18 N.H. 423 (1846); *McNamara v. King*, 7 Ill. (2 Gilm.) 432, 436 (1845); *Linsley v. Bushnell*, 15 Conn. 225 (1842); *Sanborn v. Neilson*, 4 N.H. 501 (1828).

[9] *See, e.g., Alabama Great Southern R.R. v. Sellers*, 93 Ala. 9, 9 So. 375 (1891) ("The true theory of exemplary damages is that of punishment, involving the ideas of retribution for willful misconduct, and an example to deter others from its repetition."); *Railroad v. Williams*, 55 Ill. 185 (1870); *Fay v. Parker*, 53 N.H. 342 (1872); *Woodman v. Nottingham*, 49 N.H. 387 (1870); *Taylor v. Grand Trunk Railway*, 48 N.H. 303 (1869); *Barnet v. Reed*, 51 Pa. 190 (1867); *Dibble v. Morriss*, 26 Conn. 416 (1857).

ages unconstitutional on a number of due process grounds). It is not surprising that litigants during this era seldom seem to have raised constitutional objections to punitive damage awards.

Although the purely "punitive" purposes of punitive damage awards in the United States began to be generally recognized only in the middle of the 19th Century, the theoretical basis for these awards remained, and continues to remain, unchanged from the early 13th Century when such awards were subjected to control by the limitation on excessive amercements under Magna Carta. The doctrine was, in the late 19th Century, "well characterized as 'a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine.' " W. Hale, note 7 *supra*, at 303.

While the Due Process Clauses of the Alabama and Federal Constitutions undoubtedly permit sentencing authorities, whether they be judges or juries, considerable leeway in arriving at an ultimate determination regarding the appropriate level of punishment to be imposed in a particular case, this discretion is permitted in practice in criminal cases only where it has been circumscribed by outer [41] limits.[10] Those outer limits on potential punish-

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[10] As Blackstone observed, ideally

> a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offenses of an inferior rank.

4 W. Blackstone, *Commentaries on the Laws of England* 18 (1809). As Blackstone implicitly recognized, the task of ascertaining the level of society's approbation of particular antisocial conduct is quintessentially a legislative task. The establishment of a maximum penalty for particular conduct locates that conduct within the spectrum of conduct—from undesirable to heinous—which society attempts to eliminate or control through the imposition of punishment.

ment may be known to all persons, and the amount imposed within such limits may readily be subjected to the constraints on excessive or disproportionate punishments found in the Eighth Amendment and Art. I, § 15 of the Alabama Constitution. Due Process prohibits a system of unlimited punishments in which the amount imposed is calculated *post hoc* on an *ad hoc* basis in each case without any legislatively defined outer limits. Until such time as the Alabama legislature enacts appropriate limits, this Court is constitutionally prohibited from allowing punitive damages to be levied under the authority of § 6-5-391.

* * * * *

[51] **D. The Indiscriminate Imposition of Identical Punitive Damage Awards Against Each Defendant Without Regard to Culpability Violates the Due Process and Excessive Fines Clauses**

The jury in this case was instructed, over defendants' objections, that if they were to find for plaintiff, a single punitive damage award should be imposed on all defendants. (RT. 836-37, 852, 870.) The constitutional considerations discussed above, however, required the jury to apportion any punitive damages among defendants according to each defendant's level of culpability.

Due process prohibits granting juries the unfettered power to impose financial sanctions in an arbitrary fashion. *Giaccio v. Pennsylvania*, 382 U.S. at 403. Similarly, the Excessive Fines Clauses of the United States and Alabama Constitutions prohibit the imposition of fines, whether labelled "civil" or "criminal," that are disproportionate to the offense in question. By prohibiting the jury from [52] considering the varying degrees of culpability of the various defendants, the instruction at issue required the jurors to impose a single punitive damage award against each defendant, with each being jointly and severally liable for the entire award. The imposition of punitive damages in

such a manner was clearly arbitrary and prevented the jury from imposing punitive damages that were proportionate in amount to the culpability of each defendant. Consequently, the $2,750,000 fine in this case violates the Due Process and Excessive Fines clauses.

* * * * *

APPENDIX L

IN THE SUPREME COURT OF ALABAMA

SUPREME COURT
NUMBER 87-1070

DEBBY D. CLARDY, as the Executrix of the Estate of Thomas Eugene Clardy, deceased, and CLARDY REALTY, INC.,

APPELLANTS,

Vs.

MARTHA HOFFMANN SANDERS,

APPELLEE.

* * *

ON APPEAL FROM THE CIRCUIT COURT

OF MONTGOMERY COUNTY, ALABAMA

* * *

BRIEF AND ARGUMENT OF APPELLEE

* * *

RICHARD M. JORDAN
302 Alabama Street
Montgomery, Alabama 36104
205/265-4561

RANDY MYERS
302 Alabama Street
Montgomery, Alabama 36104
205/265-4561

W. SIDNEY FULLER
28 South Court Square
Post Office Drawer 1637
Andalusia, Alabama 36420
205/222-4196

ATTORNEYS FOR
APPELLEES

* * *

ORAL ARGUMENT HAS BEEN REQUESTED

* * * * *

[76] Contrary to the Appellants' contention, defendants in this case have had every vestige of due process afforded them in the conduct of this trial by an able, conscientious, careful and conservative Judge. It is ludicrous to argue that the Jury may not have the prerogative to assess damages in such amounts as they deem appropriate commensurate with the culpability of the wrongful act of the defendants in a death case. As a matter of fact, the Jury has the prerogative to assess such damages in injury cases and wherever permitted at common law. This particular verdict has been carefully scrutinized under common law principles by the Trial Court.

We concur with the statement quoted in Appellants' Brief at page 17, "that it is very dangerous for the Judges to intermeddle in damages for torts".

The upshot of defendants' argument here is that the Jury should not be allowed to assess damages in their discretion. A suggestion that jury trials be abolished in civil cases. However, we would note that the right of trial by jury must remain inviolate under the [77] provisions of Sections 11, Article I of the Alabama Constitution 1901. The U. S. Constitution by virtue of the 7th Amendment likewise guarantees a trial by jury in civil cases.

Amendment VII, Constitution of the United States (Trial by Jury in Civil Cases):

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

Article I, Alabama Constitution, 1901:

> "Sec. 11. Right to trial by jury.
>
> That the right of trial by jury shall remain inviolate."

The inviolate right to trial by jury has existed since the Magna Charta (June 15, 1215). *Alford v. State ex rel Atty. Gen.*, 170 Ala. 178, 54 So. 213 (1910):

> "Whatever may be the origin or true history of the jury trial, it is certain that, ever since the Magna Charta, the right to it has been esteemed a peculiar and inestimable privilege by the English race. For centuries this great charter has been appealed to, as the protector of the people against the encroachment of the prerogative or despotism of the sovereign. The English colonists who settled in America brought with them this love for and veneration of this cherished right. Alford v. State ex rel Attorney Gen., 170 Ala. 178, 54 So. 213 (1910)."

B. Here Appellants argue that the verdict was [78] unconstitutional because the amount of recovery is unlimited, i.e., no caps prevail under the Alabama Death Statute.

As noted in the history of the Death Act, the Legislature in creating the Death Act has this prerogative. However, the Act as written contains no caps and there is certainly no basis for a constitutional problem in this regard. We

submit that it is simply untrue that this Court is "constitutionally prohibited" from allowing punitive damages to be levied under the authority of Sec. 6-5-391 until the Alabama Legislature enacts limits or caps on the Death Act. The Alabama Wrongful Death Act is a legislative creature and as announced in the per curiam opinion in *Blackbelt* at 514 So. 2d 1250, 1263, n. 15, changes in the Act are matters for the Legislature. Particularly true now since the Legislature did not elect to alter the provisions of the Act at the time of the recent passage of the "tort reform" legislation.

* * * * *

APPENDIX M

IN THE SUPREME COURT OF ALABAMA

NO. 87-1070

DEBBY CLARDY, in her representative capacity as Executrix of the Estate of Thomas Eugene Clardy, deceased, and CLARDY REALTY, INC.

Appellants

vs.

MARTHA HOFFMAN SANDERS, mother of NORMA DAVISON HOFFMAN, deceased minor

Appellee

APPPELLANTS' APPLICATION FOR REHEARING OR ALTERNATIVELY FOR STAY OF EXECUTION AND BRIEF IN SUPPORT THEREOF

Michael B. Beers
Julian P. Hardy
Karon O. Bowdre

Attorneys for Appellants

OF COUNSEL:

BEERS, ANDERSON, JACKSON & SMITH, P.C.
272 Commerce Street, Suite 210
Montgomery AL 36104

PRITCHARD, McCALL & JONES
901 Brown Marx Tower
Birmingham AL 35203

RIVES & PETERSON
1700 Financial Center
Birmingham AL 35203
Tel: 205/328-8141

ORAL ARGUMENT IS REQUESTED

* * * * *

[1] APPLICATION FOR REHEARING OR ALTERNATIVELY FOR STAY OF EXECUTION

Appellants Debby D. Clardy and Clardy Realty, Inc., petition this Court, pursuant to Ala.R.App.P. 40, for a reconsideration and rehearing on the appeal which this Court denied on June 23, 1989. The decision in this case should be re-examined in view of the opinion rendered by the Supreme Court of the United States on June 26, 1989 in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, 57 U.S.L.W. 4985 (1989).

The various opinions in *Browning-Ferris*, together with those issued in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. ___, 108 S. Ct. 1645 (1988), reveal that five Justices of that Court have now expressed the position that the imposition of potentially unlimited punitive damage awards raises legitimate and serious questions under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Consequently, this Court should re-examine and carefully reconsider appellants' argument that the imposition of potentially unlimited monetary punishment under Ala. Code § 6-5-391 is fundamentally offensive to the Due Process Clauses of the Alabama and United States Constitutions. Upon rehearing, the Court should hold invalid the punitive award levied in this case.

Should this Court deny this Application for Rehearing, appellants request that the Court stay execution of the judgment against them. If rehearing is denied, appellants [2] intend to file a Petition for Writ of Certiorari in the Supreme Court. Appellants have posted and will maintain with the trial court a supersedeas bond sufficient to cover the judgment plus interest. Appellants request that the judgment of this Court be stayed until such time as the Supreme Court disposes of their Petition.

As grounds for said request, appellants rely on the brief submitted with this application.

[3] BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

ARGUMENT

I. This Court should reconsider and reverse its holding that the imposition of potentially unlimited punitive damage awards does not violate the Alabama and United States Constitutions.

In its June 23, 1989 opinion, this Court summarily rejected all of appellants' constitutional challenges to the $2,750,000 punitive damage award imposed by the jury.[1] The opinion contains no express discussion of those constitutional challenges. The Court quoted in full the trial court's supplementary order denying appellants' post-judgment motions and announced simply that the Court found "no constitutional basis for reversal". *Clardy v. Sanders*, No. 87-1070, slip op. at 9-10 (June 23, 1989). The Court concluded by citing, without discussion, two of its recent decisions, *Industrial Chemical & Fiberglass Corp. v. Chandler*, Nos. 86-381, -385 [4] (June 23, 1989)(on rehearing), and *Central Alabama Electric Cooperative v. Tapley*, No. 87-1188 (May 12, 1989).

The Court's reliance on the trial court's post-trial order to reject appellants' constitutional arguments is entirely

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[1] Although the discussion in the text of this brief concentrates on the due process violation posed by the imposition of unlimited punitive damage awards, appellants, by this Application, hereby preserve each of the separate constitutional challenges advanced in their brief filed September 9, 1988 with this Court.

Further, reconsideration by this Court of this particular due process question should be made with regard to the fact that the punitive award was imposed on multiple defendants without any apportionment based upon the relative culpability of those defendants. As appellants have argued, this failure to apportion damages constitutes an independent violation of the Due Process Clauses of the Alabama and United States Constitutions and heightens the need for this Court's reconsideration of appellants' primary due process challenge to the punitive award at issue.

misplaced. The trial court's order, pursuant to the rule of *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), considered whether the punitive damage award is excessive as a matter of common law—not constitutional law. Moreover, this Court's reference to its decision in *Central Alabama* does not add materially to its summary rejection of the due process questions presented in this case because *Central Alabama* did not fully address these appellants' due process challenges to the imposition of unlimited punitive damage awards. In *Central Alabama*, the Court responded to the due process issue raised in that case by observing that:

(1) The amount of compensation to be awarded and the extent of punishment to be meted out have historically been "subjects unquestionably within the sacred domain of the jury", and have been subjected to constitutional attack only *"very* recently"; (2) punitive damages are the only damages available in an Alabama wrongful death action; (3) the American civil jury system "is the worst in the world—except for all of the rest" and has successfully been adapted to face new challenges; (4) a defendant is entitled to challenge a jury's verdict as excessive pursuant to common law principles by moving for remittitur and new trial, appealing from a denial of [5] either, obtaining *de novo* review of a jury verdict, or obtaining a *Hammond*-hearing, pursuant to which a trial court is "authorized" to consider questions such as whether the punitive damages awarded bear a reasonable relationship to the actual or likely harm; and (5) juries "should be entitled to punish defendants so severely as to destroy them", in the "rarest" cases. No. 87-1188, slip op. (unpaginated).

There is no evident nexus between the reasoning of the *Central Alabama* decision and the due process questions presented in the instant case. The immunity from constitutional scrutiny traditionally enjoyed by punitive damage awards, along with this Court's entirely appropriate respect for the civil jury system, do not respond to the

question whether a jury may be constitutionally permitted to impose punitive damage awards without statutory (or equivalent) limits on the amount of those awards. The fact that Alabama law provides for the award of only punitive damages in wrongful death cases does not establish that the imposition of wrongful death punitive damage awards absent statutory limitations comports with due process. Nor does it establish that the award of $2,750,000 in this case comports with the requirement of the Due Process Clause of the Fourteenth Amendment that the punishment be proportioned to the offense as measured by punishments imposed for similar offenses in Alabama. And, as noted above, the availability of post-trial procedures for the review of punitive damage awards is of no constitutional [6] significance—particularly in light of this Court's reluctance to invade the "sacred domain of the jury" in this area and in view of this Court's advance approval in *Central Alabama* of punitive damage awards that may "destroy" defendants.

This Court should undertake a more thorough analysis of the constitutional challenges raised by appellants. The need for rehearing on appellants' due process challenge to the imposition of unlimited punitive damage awards is particularly pressing in light of the Supreme Court's recent decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, 57 U.S.L.W 4985 (1989).

As is clear from the *Browning-Ferris* decision and the Supreme Court's earlier decision in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. ___, 108 S.Ct. 1645 (1988), five members of the Supreme Court—Justices Brennan, Marshall, Stevens, O'Connor, and Scalia—have now authored or joined in opinions expressing serious constitutional reservations under the Due Process Clause of the Fourteenth Amendment with a system that permits the imposition of unlimited punitive damage awards. The Court made clear in its opinion in *Browning-Ferris* that it had never addressed "whether due process acts as a check on

undue jury discretion to award punitive damages in the absence of any express statutory limit". 57 U.S.L.W at 4990.

In addition, Justice Brennan's concurring opinion in *Browning-Ferris*, which was joined by Justice Marshall, expressly stated that the Court's opinion "leaves the door [7] open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." 57 U.S.L.W. at 4991 (Brennan, Jr., concurring). Justice Brennan pointed out that "[w]ithout statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." 57 U.S.L.W. at 4992. Justice Brennan noted that punitive damages are typically imposed by juries "guided by little more than an admonition to do what they think is best," 57 U.S.L.W. at 4992, and concluded that because the " 'touchstone of due process is protection of the individual against arbitrary action of government,' " he "would look longer and harder at an award of punitive damages" based on typical "skeletal guidance" provided to juries than at "one situated within a range of penalties as to which responsible officials had deliberated and then agreed." 57 U.S.L.W. at 4992 (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). However, because the due process questions in *Browning-Ferris* were not properly before the Supreme Court for procedural reasons, Justice Brennan chose to "leave fuller discussion of these matters for another day." 57 U.S.L.W. at 4992.

Justice O'Connor, in a separate opinion in *Browning-Ferris* joined by Justice Stevens, stated that she "shares Justice Brennan's view . . . that nothing in the court's opinion forecloses [8] a due process challenge to awards of punitive damages or the method by which they are imposed." *Browning-Ferris*, 57 U.S.L.W. at 4992 (O'Con-

nor, J., concurring in part and dissenting in part). Moreover, Justice O'Connor expressly adhered to the position she had previously expressed, along with Justice Scalia, that the power of juries "to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state . . . may violate the Due Process Clause." *Bankers Life and Casualty Co. v. Crenshaw,* 108 S.Ct. at 1655 (O'Connor, J., concurring in part and concurring in the judgment).

As demonstrated by the foregoing, the majority of the Justices of the Supreme Court of the United States have expressed the view that the absence of pre-established limits on the size of punitive damage awards presents a legitimate and compelling due process question. The instant case squarely presents this due process question. This Court should accordingly grant appellants' Application for Rehearing, apply a considered analysis to appellants' due process arguments, and hold that the imposition of the $2.75 million punitive damage award in this case violated the Due Process Clauses of the Alabama and United States Constitutions.

* * * * *

Supreme Court, U.S.
FILED
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No. 89-440 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBBY CLARDY, as Executrix of the Estate of Eugene Clardy, deceased, and CLARDY REALTY, INC., *Petitioners*,

v.

MARTHA HOFFMANN SANDERS, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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RESPONDENT'S BRIEF IN OPPOSITION

DONALD N. BERSOFF
BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

RICHARD JORDAN AND
RANDY MYERS, P.C.
302 Alabama Street
Montgomery, AL 36104
(205) 265-4561

W. SIDNEY FULLER
28 South Court Square
Post Office Drawer 1637
Andalusia, AL 36240
(202) 222-4196

Attorneys for Respondent

* Counsel of Record

October 12, 1989

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QUESTIONS PRESENTED

1. Whether a punitive damage award of $2,750,000 for reprehensible conduct resulting in the loss of human life, under a unique wrongful death statute that prohibits compensatory damages, violates the Due Process Clause of the Fourteenth Amendment where the amount of the award was subject to an "extensive post-trial evidentiary hearing," and to searching *de novo* review by both trial and appellate courts?

2. Whether the Due Process Clause limits the substantive authority of the states to permit joint and several liability for jointly culpable tortfeasors?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-440

DEBBY CLARDY, as Executrix of the Estate of Eugene Clardy, deceased, and CLARDY REALTY, INC., *Petitioners*,

v.

MARTHA HOFFMANN SANDERS, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners describe this case as a "vehicular accident" in which petitioner Clardy's decedent and respondent's daughter were killed. Petition for Writ of Certiorari [hereinafter Pet.] at 4. But the conduct that resulted in a punitive damage award was not a simple "accident."

As set forth in the June 23, 1989 Opinion of the Alabama Supreme Court [hereinafter Opinion], respondent's sixteen-year old daughter, Norma Hoffmann, a high school honor student, was the innocent victim of a high speed nighttime drag race in a school zone on a residential street in Montgomery, Alabama between two drunken defendants, Thomas Clardy and James Kervin. Miss Hoffmann was killed (and her minor passenger seriously injured) when Clardy, whose blood alcohol level was

.21%,[1] attempted to pass Kervin at 80 MPH, crossed over a double yellow line, and smashed head-on into her car. Opinion, Pet. at 2a-3a. "[A]ll of the testimony, which included that of several eye-witnesses, showed that the accident was entirely the combined and concurring fault of Clardy and Kervin." Opinion, Pet. at 3a.

Respondent brought a civil action under Ala. Code § 6-5-391, which permits parents to sue for the wrongful death of their minor child. Following a lengthy trial, a jury awarded respondent $2.75 million in punitive damages.[2] No compensatory damages were awarded because they are barred under § 6-5-391, which "is designed to furnish a complete system for all actions for the death of a minor child." *Eich v. Town of Gulf Shores*, 293 Ala. 95, 97, 300 So.2d 354, 356 (1974). "[T]he damages recoverable under this section are entirely punitive and are based on the culpability of the defendant and the enormity of the wrong, and are imposed for the preservation of human life." *Id.* at 98, 300 So.2d at 356.[3]

As required by *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), the trial court conducted an extensive post-trial *evidentiary* hearing to determine if the jury's verdict was excessive. The trial court then en-

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[1] That is far above the level of legal intoxication in all jurisdictions. *See, e.g.*, Ala. Code § 32-5A-191(a)(1) ("A person shall not drive . . . while there is 0.10 percent or more by weight of alcohol in his blood.").

[2] The jury found against the estate of Thomas Clardy, Clardy Realty, Inc., and James Kervin. The jury did not find against Kerwin's father, John, against whom respondent had made a claim of negligent entrustment of a motor vehicle because James Kervin had had five speeding tickets in the two years preceding the drag race. Opinion, Pet. at 2a.

[3] The Alabama wrongful death statute "has been judicially interpreted to authorize the recovery of *only* punitive damages." *Black Belt Wood Co., Inc. v. Sessions*, 514 So.2d 1249, 1262 (Ala. 1986) (emphasis in original).

tered an Order reciting the reasons why it concluded the verdict was not excessive:

> This Court has considered the *combined culpability* of the Defendants, the desirability of discouraging others from similar conduct, the impact of the judgment on the parties and innocent third persons and has also considered the *necessity of preventing unnecessary homicides*, especially in cases where the facts and circumstances are similar to those that took the life of Norma Hoffmann and Thomas Eugene Clardy. . . .
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> . . . .
>
> . . . There was *no* evidence that the verdict in this case was based on bias, passion, prejudice, corruption or other improper motive. . . . The jurors acted responsibly and conscientiously throughout a well tried case. . . . The jury's verdict for 2.75 million dollars was consistent with the evidence and the Court's instructions, and, after due consideration, the Motion of the Defendants [for JNOV or for New Trial—see Petition at 69a] was previously DENIED the 11th day of May, 1988.

Pet. at 15a-16a (emphasis added).

Petitioners appealed, as of right, to the Alabama Supreme Court.[4] The justices of that court unanimously (6-0) found "no constitutional basis for reversal," Pet. at 13a, and "no basis for reversal on non-constitutional grounds." *Id.* Petitioners then filed a motion for rehearing or, alternatively, for a stay of execution of the judgment. On September 8, 1989, the Alabama Supreme Court, again unanimously, denied a stay. *See* Pet. at 14a. Although the court issued no opinion with its denial, two justices concurred specially to emphasize that:

> . . . punitive damages in a wrongful death case, such as the case here, *are different in nature from punitive damages in any other type of tort action in Alabama.* The defendants' constitutional arguments

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[4] Defendant James Kervin did not appeal.

> concerning this punitive damages award must be considered in a *different* light than constitutional challenges to punitive damages awards in *other* tort actions, because in Alabama, only punitive damages are recoverable in a wrongful death action.

Id. (emphasis added).

Petitioners sought a stay of the judgment from Circuit Justice Kennedy, who denied a stay on September 20, 1989. Petitioners resubmitted their application for a stay to Justice Stevens, who granted a stay on September 25, 1989, pending further order of the Court. On October 10, 1989, the full Court granted the stay, pending its action on the instant petition.

SUMMARY OF ARGUMENT

The unique and atypical circumstances of this case make it an inappropriate vehicle for considering whether the Due Process Clause limits jury discretion to determine an appropriate award in the typical punitive damages case. First, Alabama provides extraordinary safeguards to ensure that punitive damage awards are fair and reasoned, including the right to a post-verdict *evidentiary* hearing to challenge the size of the award, appeal as of right, and *de novo* review. Second, although in typical cases the excessiveness of a punitive award can be evaluated by reference to the size of the compensatory award, that standard could not be employed to evaluate the propriety of this award because this case arose under a unique wrongful death statute that permits only punitive awards. Point I.A.

Because of its facts, this case does not present a substantial federal question, and it fails to meet the other enumerated criteria of S. Ct. R. 17. The decision of the Alabama Supreme Court is not at variance with any other court. The due process limitation on jury discretion urged by petitioners finds *no* support in civil law, and has been rejected by this and lower courts even in criminal proceedings. Point I.B.

There is no basis in the text of the Due Process Clause, its history, or the caselaw, for the *substantive* limit on state power to permit joint and several liability for jointly culpable tortfeasors that petitioners propose. Nor is there a common law consensus requiring apportionment, as petitioners mistakenly claim. Petitioners are asking the Court to make a substantive policy choice that should be left to legislative judgment. Point II.A.

Furthermore, this would be an inappropriate case for considering the apportionment question petitioners raise. Petitioner Clardy's decedent engaged in reprehensible conduct that caused the death of respondent's minor daughter. He was drag racing, while drunk, at 80 MPH in a residential neighborhood on the wrong side of a double yellow line when his car smashed head-on into hers. The jury found that he was more culpable than the codefendant with whom he was racing. There is no dispute that the crash was "entirely the combined and concurring fault" of petitioner's decedent and the codefendant. Petition at 3a. Thus, this is not a case in which a less culpable defendant has been assessed damages occasioned largely by the unforeseeable acts of a more culpable defendant. Point II.B.

REASONS FOR DENYING THE WRIT

Petitioners ask the Court to review two questions involving the Due Process Clause of the Fourteenth Amendment: (1) whether that Clause limits "undue" jury discretion to fix the amount of punitive damages that may be awarded if there is no "express statutory limit," and if so, what restrictions as to amount are required by that Clause; and (2) whether that Clause precludes imposing "a single punishment on multiple defendants for a single instance of wrongful conduct without regard to their relative culpability." Pet. at i.[5]

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[5] For respondent's formulation of the Questions Presented *see supra* at i.

I. THE COURT SHOULD NOT GRANT REVIEW IN THIS CASE TO DECIDE WHETHER THE DUE PROCESS CLAUSE LIMITS THE SIZE OF PUNITIVE DAMAGE AWARDS.

A. The Present Case Is *Sui Generis* And Is Not An Appropriate Vehicle For Considering Whether The Due Process Clause Imposes Substantive Or Procedural Limits On The Size Of Punitive Damage Awards.

It is not enough that a question be worthy of the Supreme Court's consideration in the abstract. The case in which the question is raised must present "special and important reasons" deserving review. Sup. Ct. R. 17.1.[6] Assuming, without conceding, that whether the Due Process Clause limits the size of punitive damage awards is a federal question of substance, does not mean this case is a proper vehicle for deciding that general question:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955) (citations omitted); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). This case is not an appropriate vehicle for resolving that general due process question for several reasons.

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[6] Because the other enumerated criteria in Rule 17 are clearly inapplicable, petitioners only seek review by arguing that this case raises an important question of federal law that should be settled by this Court. *See* Sup. Ct. R. 17.1(c).

1. *Alabama provides substantial and perhaps unique standards and procedures for assessing and reviewing punitive damage awards.*

Although some members of the Court have expressed concern about punitive damage awards, they have not expressed concern about punitive damages *per se*. The concerns expressed have been the possibility that verdicts may result from bias, passion or prejudice and be employed "to punish unpopular defendants," *Electrical Workers v. Foust*, 442 U.S. 42, 50-51 n.14 (1979); the "lack of sufficient standards governing punitive damage awards," *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828 (1986);[7] the "grant of wholly standardless discretion to determine the severity of punishment," *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, —, 108 S.Ct. 1645, 1656 (1988) (O'Connor, J., concurring in part and concurring in the judgment); and "undue jury discretion to award punitive damages," *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2921 (1989), in the absence of "statutory (or at least common law) standards." *Id.* at 2923 (Brennan, J., concurring).

Those concerns are not presented by this case. Petitioners do not argue that this award was the result of bias, passion, prejudice, corruption, or improper motive, and the trial court found as a fact that it was not. Pet. at 16a. Nor was this damage award the product of "wholly standardless" and "undue" jury discretion. To the contrary, in Alabama wrongful death actions, under

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[7] Although this concern has been expressed in *Lavoie*, an Alabama case, *Lavoie* is clearly distinguishable. That case involved a bad-faith refusal to pay an insurance claim in which compensatory damages were also awarded. Alabama's wrongful death statute, which bars compensatory damages, was not at issue. Since *Lavoie*, as respondent will explain, the Alabama Supreme Court has adopted additional standards and procedures to govern the assessment and review of punitive damage awards. *See Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).

recently augmented common law standards and procedures, jury discretion is constrained by very specific standards and instructions, and jury verdicts are subject to searching and perhaps unique post-trial review by trial and appellate courts to ensure those verdicts are fair and reasonable. "If a defendant is dissatisfied with a jury's verdict, and feels that it is excessive, or otherwise flawed, he is entitled to the protection of a variety of safeguards." *Central Alabama Electric Cooperative v. Tapley*, No. 87-1188 (Ala. May 12, 1989); Pet. at 32a, 40a [hereinafter all citations to *Tapley* will be to the Petition].

Immediately after the Court's decision in *Lavoie* in 1986, the Alabama Supreme Court fashioned additional procedural and substantive safeguards to ensure fair and consistent administration of punitive damages. Out of caution to prevent punitive damages from being tainted by bias or prejudice, Alabama, unlike other states, strictly forbids the introduction of any evidence to the jury concerning the wealth or financial circumstances of either party. *See Industrial Chemical and Fiberglass Corp. v. Chandler*, Nos. 86-381, -385 (Ala. June 23, 1989), Pet. at 17a, 22a [hereinafter all citations to *Industrial Chemical* will be to the Petition]; *Green Oil Co. v. Hornsby*, 539 So.2d 218, 222 (Ala. 1989); *Southern Life & Health Insurance Co. v. Whitman*, 358 So.2d 1025 (Ala. 1978).

In addition, Alabama provides another, and perhaps unique, procedural protection. In *Hammond v. City of Gadsden*, 493 So.2d 1374, 1378-79 (Ala. 1986), and *Hornsby*, 539 So.2d at 223-24, the Alabama Supreme Court required trial courts to hold *evidentiary* hearings and to provide written reasons for accepting or modifying the jury's verdict. These hearings are known as "*Hammond* hearings."

During these post-verdict *Hammond* hearings, the trial court is required to analyze whether the verdict was "af-

fected by bias, passion, prejudice, corruption, or other improper motive or conduct," *Hornsby*, 539 So.2d at 222, and to analyze many other factors. For example, in deciding whether a particular award is excessive under *Hammond* and *Hornsby*, the trial court is authorized to consider the following "nonexclusive" factors:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that has actually occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
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> (2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
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> (3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.
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> (4) The financial position of the defendant would be relevant.
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> (5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
>
> (6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.
>
> (7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Hornsby, 539 So.2d at 223-24, *quoting Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially); *see Tapley*, Pet. at 40a-41a. The defendant is permitted to present evidence at such a hearing to show that the jury's verdict is "unreasonable, disproportionate, or economically destructive" —a due process protection for defendants that may be unique to Alabama. *Industrial Chemical*, Pet. at 29a; *Hornsby*, 539 So.2d at 224.[8]

The defendant may appeal "as a matter of right" from the trial court's denial of motions for remittitur or new trial, and "is entitled to a *de novo* review of the jury's verdict on appeal." *Tapley*, Pet. at 40a; Ala. Code § 12-22-71. Thus, appellate courts are free to make their own independent assessment of the factual basis for the amount of the award, and can "order a new trial due to the excessiveness of the verdict," or can "order a new trial unless the plaintiff accepts a remittitur." *Tapley*, Pet. at 40a (citations omitted); *see* Ala. Code § 12-22-71.[9] "From these considerations (and from those reaffirmed in *Hammond v. City of Gadsden*, 493 So.2d 1379 (Ala. 1986), emerge two related protections: First, a requirement of 'reasonableness, of proportionality, of sensible relation between punishment and offense,' and, second, a guarantee of 'not just bare survival, but continued productive economic viability.'" *Industrial Chemical*, Pet. at 28a.[10]

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[8] "In sum, 'fundamental fairness' requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonable, disproportionate, or economically destructive. . . ." *Industrial Chemical*, Pet. at 28a-29a.

[9] *See* Ala. R. Civ. P. 59(f): "The court may, on a motion for a new trial, require a remittitur as a condition to the overruling of the motion for new trial; . . ."

[10] Petitioners completely ignore *Industrial Chemical's* "guarantee" of continued economic viability and cite *Tapley* for the propo-

Petitioners had the benefit of all of these standards and procedures. The jury was properly instructed as to the law of punitive damages, including the admonition that the "amount of damages should be directly related to the amount of wrongdoing on the part of the Defendant, or Defendants," Trial Record at 853, and those instructions are not challenged here. After the jury's verdict, defendants filed Motions for Judgment Notwithstanding the Verdict, a New Trial, and a Remittitur. The trial court conducted an extensive evidentiary post-trial hearing on these issues, at which defendants introduced additional documents and the testimony of three witnesses. Post-Trial Record at 53-101; Post-Trial Exhibits 1-4. The Court denied defendants' post-trial motions, and subsequently entered an order setting forth its reasons for finding that the award was not excessive. *See* Pet. at 15a, 69a-82a. Petitioners appealed that decision as of right to the Alabama Supreme Court, which conducted a *de novo* review and unanimously affirmed the trial court in its entirety. *See* Pet. at 1a.

Because Alabama law gives defendants fair notice of the factors that will be considered in assessing and reviewing punitive damage awards, and provides extraordinary post-verdict procedures to ensure that those factors have been fairly applied, petitioners are forced to argue that a factor-based system, with procedures to ensure their fair application, is not enough to satisfy the requirements of due process. Instead of case-by-case evaluation and weighing of the relevant factors, petitioners

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sition that in some cases Alabama law might permit the economic destruction of a defendant. Pet. at 7, 15. That possibility, though noted in passing in *Tapley*, was expressly reserved for "the rarest cases, involving the most egregious conduct. . . . [I]n the typical punitive damages case, the award should punish without destroying." *Tapley*, Pet. at 41a-42a. In any event, that issue is not raised by the facts of this case. The Petition does not contend that petitioners would be economically destroyed by the award if it were allowed to stand.

insist that due process requires specific legislative standards from which the amount of monetary punishment that will be appropriate in a given case can be derived with near mathematical precision to limit jury (and judicial) discretion.

Of course, it would be impossible for a legislature to devise standards that would specify an individually appropriate punishment for every conceivable case in which punitive damages could be awarded. The whole point of punitive damage awards is that they should be individually tailored to the circumstances of each case to provide an appropriate measure of punishment and deterrence. Therefore, it would be inconsistent with the very purpose of such awards for a legislature to provide, for example, that every defendant, regardless of the nature of his/her wrongdoing, should be assessed punitive damages equivalent to five percent of his/her income; or that in all wrongful death cases, regardless of the wealth of the defendant, the defendant should pay a punitive award of $3,000,000; or that in all cases of bad faith refusal to pay an insurance claim the punitive award should be ten times the policy value, regardless of the type of policy involved or the number of policyholders who were subjected to the same wrongful refusal. That is why the states have left to juries and reviewing courts the task of weighing the relevant factors and deciding the precise award that would be appropriate for each case.

This type of case-by-case evaluation of the relevant factors and application of those factors to the facts of a particular case is the backbone of much of our law. How could a legislature determine in advance what disposition would be in "the best interests" of an individual child, or what precise rate would be "fair and reasonable" for an individual rate-making proceeding that will be conducted ten years in the future, or whether the steps taken by a particular fiduciary in a particular situation will constitute "due diligence"? Due process does not require that

kind of mechanical decision-making in those areas of the law, or in the assessment and review of punitive damage awards.

Perhaps because they recognize the unworkability of their proposal to limit jury and judicial discretion, petitioners only advance that proposal in cases where the *legislature* has not set an upper limit, or cap, on the amount of punitive damages a jury will have discretion to award.[11] Apparently, under the approach advocated in the Petition, if the Alabama legislature *had* imposed a statutory cap on punitive damage awards in wrongful death cases, the standards and procedures Alabama already has in place for assessing and reviewing those awards would be sufficient to meet the requirements of due process for *any* award within that limit. Thus, unless there is some substantive limitation in the Due Process Clause that would prohibit Alabama from authorizing a $2.75 million punitive award in the circumstances of this case—a proposition petitioners have not yet urged—petitioners are forced to argue that this award violates due process simply because Alabama has chosen not to impose a statutory cap it would have had the constitutional power to authorize.

Although petitioners characterize this argument as a procedural lack of notice, it is really a substantive due process argument in disguise. Everyone in Alabama is on notice that the legislature has chosen to cap punitive damage awards in some types of cases, but not in wrongful death cases. *See* Pet. at 14-15.[12] Thus, everyone

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[11] The first question presented asks only whether due process limits jury discretion to award punitive damages "in the absence of any express statutory limit . . . ." Pet. at i.

[12] The legislature obviously decided that punishing and deterring wrongful death is more important than punishing and deterring lesser forms of wrongdoing. The legislature's deliberate decision not to impose an arbitrary statutory cap on punitive awards in wrongful death cases rationally furthers the state's surpassing interest in the preservation of human life.

knows that if a person wrongfully causes death, the only limits on the punitive damages that can be awarded are the common law limits. But more importantly, everyone also has notice of what constitutes wrongful death under Alabama law, so that individuals conforming their conduct to the law know they can escape liability for any punitive award. And petitioners had notice, from prior Alabama decisions,[13] that if they violated the wrongful death statute, they could be subjected to a punitive award higher than the award the jury actually imposed in their case, so they cannot claim they would have obeyed the law if they had known the award could be that high.

Due process does require notice of the elements of the substantive offense, so that persons can conform their conduct to the law, but it does not require notice of the precise or maximum punishment that can be imposed for violation of the law.[14] It is not the purpose or function of the due process clause to enable potential law breakers to engage in a cost-benefit analysis of the likely or maximum cost of violating a particular law compared with the expected financial or other gain from that violation.

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[13] *Industrial Chemical and Fiberglass Corp. v. Chandler*, Pet. at 17a ($2.5 million to each of two plaintiffs in 1980 death); *Black Belt Wood Co., Inc. v. Sessions*, 514 So.2d 1249 (Ala. 1986) ($3.5 million award in 1980 death); *see* 2 Ala. Trial L. J. 16 (Summer 1983) (*Hicks v. Ireland*) ($25 million jury verdict in wrongful death action in Montgomery County Circuit Court); 3 Ala. Trial L. J. 46 (Winter 1984) (*Hickman v. Lamplighter Dinner Theatre*) ($10,050,000 jury verdict in deaths of two minors in automobile crash) *reported in The Advertiser* (Montgomery, Ala.), May 4, 1984, at C1, col. 6 ("Jury Finds Against Restaurant").

[14] Due Process does require that a sentence not be based on illegal considerations, *United States v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983), on an error of fact, *United States v. Tucker*, 404 U.S. 443 (1972), or on vindictiveness, *North Carolina v. Pearce*, 395 U.S. 711 (1969). None of these considerations are present in this case.

2. *Unlike the typical case, the propriety of this punitive award cannot be measured by reference to a compensatory award.*

Although some members of the Court have expressed concern that particular punitive damage awards might implicate the due process clause, that concern has always been raised in the context of cases in which there was a substantial disparity between the compensatory damages and the punitive damages. *See, e.g., Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., concurring in part and dissenting in part) ($51,146 in compensatory damages; $6 million in punitive damages).[15] Yet, in 1988 and 1989 the Court has declined to review every case asserting even this due process "disproportionality" issue.[16] Because this case has no proportionality issue, *a fortiori*, it is even less appropriate for review.

In cases where there is a compensatory award, defendants have argued that due process requires proportional-

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[15] *See Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645 (1988) ($20,000 in compensatory damages; $1.6 million in punitive damages); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) $1,378 in compensatory damages; $3.5 million in punitive damages).

[16] *See Longview Fibre Co. v. Jeannette Paper Co.*, 58 U.S.L.W. 3200 (U.S. Oct. 2, 1989) (No. 88-2051); *Alcolac, Inc. v. Elam*, 58 U.S.L.W. 3200 (U.S. Oct 2, 1989) (No 88-1992); *Goodyear Tire & Rubber Co. v. Hodder*, 109 S. Ct. 3265 (1989); *Miller v. Cudahy*, 109 S. Ct. 3265 (1989); *Metromedia, Inc. v. April Enterprises, Inc.*, 109 S. Ct. 3242 (1989); *Great Republic Insurance Co. v. Cheval*, 109 S. Ct. 3218 (1989); *Getty Petroleum Corp. v. Salem Heat and Petroleum Corp.*, 109 S. Ct. 1642 (1989); *Eaton Corp. v. PKL Co.*, 109 S. Ct. 1933 (1989); *Alwan Brothers Co. v. Gnidovec*, 109 S. Ct. 1315 (1989); *Nationwide Mutual Insurance Co. v. Clay*, 109 S. Ct. 863 (1989); *Mutual Life Insurance Co. of New York v. Estate of Wesson*, 108 S. Ct. 2035 (1988); *Ohio Casualty Insurance Co. v. Downey Savings and Loan Ass'n*, 108 S. Ct. 2023 (1988); *see also American General Life & Accident Insurance Co. v. Miller*, 108 S. Ct. 2007 (1988) (appeal dismissed for want of substantial federal question).

ity between the compensatory award and the punitive award.[17] If that argument were accepted, the Court could fashion a relatively objective standard (for example, that the punitive award should not exceed three times the compensatory award), and could then review the excessiveness of punitive awards in that and other cases by reference to that standard. But no such relatively objective standard could be fashioned to resolve *this* case. Other than the common law standards, which have already been applied, no other standard for measuring the propriety of the award in this case comes readily to mind, and petitioners have not even *suggested* any such standard.

If the Court is inclined to consider fashioning a judge-made constitutional rule for measuring the proprietary of punitive damage awards, it should first confront that issue in the *typical* case, where a standard requiring proportionality between compensatory and punitive awards is at least a theoretical possibility.

This case offers a very circumscribed and rare set of facts occurring only in wrongful death cases in Alabama. It is at one end of a broad spectrum of punitive damage cases—it does not involve an economic, nonviolent tort caused by a large out-of-state for-profit corporation pitted against a favored local plaintiff.[18] Instead, it involves an

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[17] That is not the rule at common law, for very good reason. Tortious conduct may cause little or no actual injury, but may merit a substantial punitive award in order to deter similar conduct in the future. For example, suppose a hunter pursues his prey across a campground and sprays a crowd of campers with a shotgun blast. Even if the worst injury was minor damage to a camper's tent, that reckless conduct would merit a substantial punitive award. That is why the common law requires proportionality between the punitive award and the nature of the wrong, not between the award and the actual injury.

[18] In this case, one of Thomas Clardy's sisters was a local district judge and another was a local district attorney.

egregious and wanton disregard for human life that is also criminal under state law,[19] a case quintessentially deserving of substantial punitive damages.[20] Because this case presents an issue arising from a unique statute [21] in a narrow context, *i.e.*, a wrongful death action in which the Court could not consider whether due process required proportionality between the compensatory and punitive awards, it is not an appropriate vehicle for resolving more general due process concerns. Because no other jurisdiction has a wrongful death statute that bars the award of compensatory damages, *see* C. GAMBLE, ALABAMA LAW OF DAMAGES 490 (2d ed. 1988),[22] this case would not be

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[19] Clardy and Kervin's conduct is punishable under a variety of criminal statutes under Alabama law. *See e.g.*, murder, defined, *inter alia*, as causing death under circumstances manifesting extreme indifference to human life, Ala. Code § 13A-6-2(a)(1); manslaughter, defined, *inter alia*, as recklessly causing the death of another person, Ala. Code § 13A-6-3(a)(1); and criminally negligent homicide, defined as causing the death of another person by criminal negligence. Ala. Code § 13-6-5(a). Alabama also criminalizes improperly overtaking a vehicle on the left, Ala. Code § 32-5A-84; driving at an unreasonable and imprudent speed, Ala. Code § 32-5A-190; "drag racing," Ala. Code § 32-5A-178; and driving under the influence of alcohol. Ala. Code § 32-5A-191.

[20] The Court has repeatedly noted that punitive damages may be awarded "to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974); *accord Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Smith v. Wade*, 461 U.S. 30, 54 (1983).

[21] *Cf. Curry v. Baker*, 479 U.S. 1301, 1302 (Powell, Circuit Justice 1986) (application for stay denied in case presenting "unique facts closely tied to Alabama election law and rules").

[22] "The characteristic of the Alabama wrongful death statutes that makes them distinguishable from all other statutes is the punitive construction judicially applied to the statutes. All wrongful death statutes in other jurisdictions base recovery upon compensatory considerations." *Id.* In 1956, the Court noted that "Alabama and Massachusetts award only punitive damages for wrongful deaths." *Massachusetts Bonding & Insurance Co. v. United States*, 352 U.S. 128, 130-31 (1956). Massachusetts subsequently amended

as appropriate for review as a case involving a punitive damage award under a more typical statute.[23]

B. The Due Process Limitation On Jury And Judicial Discretion Urged By Petitioners Finds No Support In Either Civil or Criminal Law.

1. *Civil law.* Petitioners have been unable to cite any civil cases that adopt the due process limitation on punitive awards they urge, because there are none. To the contrary, courts that have addressed the issue have rejected any such due process limitation. *See, e.g. Miller v. Cudahy Co.*, 858 F.2d 1449, 1459 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989) ("appellants have cited no persuasive federal constitutional authority to support their argument" [that the fourteenth amendment requires limits on award of punitive damages]).

2. *Criminal law.* The only cases petitioners cite to support their argument are cases involving criminal penalties.[24] But that reliance is misplaced. As this Court

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its tort claims act to provide for compensatory damages, *see Hoyt v. United States*, 286 F.2d 356-57 (5th Cir. 1961); *Guy v. Johnson*, 448 N.E.2d 1142-43 (Mass. App 1983), leaving only Alabama with this unique statute.

[23] *See Santosky v. Kramer*, 455 U.S. 745, 749 (1982) (case affecting 37 jurisdictions); *People v. O'Neill*, 359 U.S. 1, 3 (1959) (concerning constitutionality of statute in force in 43 jurisdictions); *McGee v. Int'l Life Insurance Co.*, 355 U.S. 220-21 (1957) ("case raised important questions, not only to California but to other States which have similar law.").

[24] *See* Pet. at 15-16. Using these cases, petitioners argue, as noted, *supra*, that the precise due process vice of Alabama's punitive damage system is that it provides no notice regarding the maximum punishment that may be imposed for egregious and harmful conduct, including wrongful death, and demand that the legislature should either place a cap on punitive damages or announce the amount of damages for every possible act deserving of punitive damages. None of the cases cited by petitioners so hold. In *United States v. Batchelder*, 442 U.S. 114 (1979), the Court held that the district judge could impose a maximum sentence under one federal

has noted, "legislatures [are] free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion).[25] And even in capital cases, the constitutional limits on jury discretion are based on the Eighth Amendment, *not* on the Due Process Clause. Indeed, in *McGautha v. California*, 402 U.S. 183 (1971), the Court squarely held that the total absence of *any* standards to guide or limit jury discretion in capital cases did not violate the Due Process Clause.[26]

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law although the same conduct was also proscribed by another federal statute, but with a significantly lower maximum sentence. *Berra v. United States*, 351 U.S. 131 (1956), held that a defendant had no right to a jury instruction permitting the jury to make a choice between two criminal statutes when the prosecutor charged the defendant under the statute with more onerous penalties. In fact, the dissenting opinion, the only part of the decision that petitioners cite, supports respondent. The dissent agreed that the legislature "may vest the judge and the jury with broad power to say how much punishment shall be imposed for a particular offense," and recognized that differences in penalties may arise as a result of "different appraisals given the circumstances of different cases by different judges and jury." *Id.* at 140. Finally, *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), does not further petitioners' argument. There the Court found violative of due process a law allowing juries to punish criminal defendants for "reprehensible" conduct even when the defendant was *acquitted* of the charged offense. Because that was tantamount to finding defendants for "reprehensible" conduct without defining that term, the Court found the law unconstitutionally vague. The Court noted, however, that it "intend[ed] to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." *Id.* at 405 n.8.

[25] *See also Solem v. Helm*, 463 U.S. 277, 290 (1983) referring to the "broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals."

[26] Due process challenges to standardless jury sentencing have been universally *rejected*. *See Garcia v. United States*, 769 F.2d

More recently, the Court has upheld, against constitutional attack, an Alabama sentencing scheme much like that used by Alabama in imposing and reviewing punitive damage awards. *See Baldwin v. Alabama*, 472 U.S. 372 (1985). Under Alabama capital sentencing procedures, once the jury convicts a defendant of aggravated murder it must sentence the defendant to death. However, that sentence is not final. It must be reviewed by the trial judge, who hears evidence of aggravating and mitigating circumstances and, after weighing the circumstances, sentences the defendant to death or to life imprisonment without parole. The defendant in *Baldwin* alleged, in part, that "the jury's mandatory sentence was unconstitutional because it was unguided, standardless, and reflected no consideration of the particular defendant or crime. . . ." *Id.* at 378.[27] The Court rejected that argument, affirming the defendant's death sentence, in large part, because the trial judge conducted a post-verdict evidentiary during which evidence was introduced as to aggravating and mitigating circumstances.

Furthermore, the Court has consistently expressed its approval of juries as "the conscience of the community." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). *See also Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (sentencing decisions of juries are "a significant and *reliable objective index* of contemporary values") (emphasis added). That those community values cannot be reduced to a precise formula, either in criminal sentencing or in

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697, 699 & n.1 (11th Cir. 1985); *R.G. Britton v. Rogers*, 631 F.2d 572, 578-581 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981); *Vines v. Muncy*, 553 F.2d 342, 347-348 (4th Cir.), *cert. denied*, 434 U.S. 851 (1977). *Cf. Stevens v. Armontrout*, 787 F.2d 1282, 1284 (8th Cir. 1986) (upholding against due process challenge a 200 year bench sentence under a statute that permitted sentence between ten years and "any number of years").

[27] The defendant also claimed that the judge's ultimate decision was impermissibly infected by the jury's mandatory sentence of death.

fixing punitive damage awards, is not a vice but a virtue of the jury system:

> [T]he inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that *defy codification* and that 'buil[d] discretion, equity, and flexibility into a legal system.' McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the *fundamental role of discretion* in our criminal justice system.

McCleskey v. Kemp, 481 U.S. 279, 311 (1987) (citation omitted) (emphasis added).

It is inconceivable that the Court would rule that the Due Process Clause *does* limit jury discretion to assess punitive damage awards, but does *not* limit jury discretion in criminal proceedings, where the injury to the defendant can be irreparable. Accordingly, reversal of the decision below would effectively require the Court to overrule this line of criminal precedents. If the Court now wishes to consider whether the Due Process Clause places substantive or procedural limits on jury discretion, it would be more appropriate to reconsider that issue first in the context of criminal proceedings.

II. THE COURT SHOULD NOT GRANT REVIEW TO DECIDE WHETHER THE DUE PROCESS CLAUSE PRECLUDES STATES FROM CHOOSING TO ALLOW JOINT AND SEVERAL LIABILITY FOR PUNITIVE DAMAGES ON JOINTLY CULPABLE TORTFEASORS.

Petitioners also urge the Court to grant review to determine whether the Due Process Clause limits the *substantive* authority of the States to permit joint and several liability for punitive damages.[28] As is true with

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[28] Petitioners acknowledge this question is "distinct" from their first question. Pet. at 8, n.4. No member of the Court has previously expressed concern about this question.

Question One, there is no conflict, or even inconsistency, between the ruling of the Alabama Supreme Court and any decision of this Court, or of any other State or federal court, with respect to this question. Thus, review is appropriate only if the question is sufficiently important to warrant this Court's immediate attention. *See* S. Ct. R. 17. Petitioners have not demonstrated that this is a substantial question that should be settled at this time. Furthermore, this question is not properly presented by the facts of this case.

A. There Is No Authority For The Substantive Limit On Punitive Damage Awards Petitioners Propose, And No Reason For The Court To Consider Creating Such A Limit.

Nothing in the text of the Due Process Clause, or in the history of its passage, supports the substantive limit urged by petitioners. Petitioners are asking the Court to establish "judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). No case cited by petitioners—and no case of which respondent is aware—has ever held or even suggested that the Due Process Clause limits state authority to impose joint and several liability for punitive damages on joint tortfeasors.[29] Indeed, prior to this case, the constitutional question appears never to have been addressed.

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[29] *Washington Gas-Light Co. v. Lansden*, 172 U.S. 534 (1899), provides no support for petitioners. There the Court simply held that, *given the existence of the common law rule that all defendants must be liable for any punitive damages award*, an award against all could not be based on evidence about the *wealth* of only one. The Court did not even discuss the purported need for apportionment of punitive damages according to individual *culpability*, much less suggest that the Due Process Clause required such a result. In Alabama, the jury is precluded from hearing evidence as to the wealth of the defendant. *See, supra*, at Point I(A)(1).

Because neither the text nor the history of the Due Process Clause, or of any case interpreting it, supports a due process "right" to individual apportionment of punitive damages, petitioners seek to justify this new right on the basis of a claimed (but non-existent) common law consensus requiring apportionment. But petitioners offer no reason why such a common law consensus would give rise to a fundamental substantive right protected by the Due Process Clause. In particular, petitioners make no claim that apportionment of punitive awards is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if it were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Such a claim would be implausible on its face. Nor have petitioners argued that the right to apportionment of punitive awards is "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.). The relatively recent emergence of the consensus claimed by petitioners forecloses any appeal to history and tradition. Thus, nothing in this Court's jurisprudence supports petitioners' endeavor to transform a common-law policy choice into a constitutional entitlement.

Furthermore, the consensus claimed by petitioners does not exist. The cases cited in the Petition do not even remotely support petitioners' contention that "a substantial majority of States that have considered the question have ruled that defendants should not be held jointly and severally liable for punitive damages." Pet. at 20. Several authorities cited by petitioners simply do not address whether apportionment is required.[30] Several of the cited

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[30] For example, both *Rubi v. Transamerica Title Ins. Co.*, 131 Ariz. 403, 641 P.2d 891 (Ct. App. 1981), and *Fredeen v. Stride*, 269 Or. 369, 525 P.2d 166 (1974), considered whether punitive damages could be recovered against one defendant when not all defendants had acted with sufficient culpability to warrant an award of

cases *permit* apportionment of punitive damages in an appropriate case, but do not *require* it.[31] At most, five of the state cases cited by petitioners definitively hold that joint and several liability for punitive damages is inappropriate.[32] And as petitioners acknowledge, at least eight States authorize joint and several liability for punitive damages. Pet. at 21 n.21. Thus, the cases on which petitioners rely refute the claimed existence of a common law consensus prohibiting the imposition of joint and several liability for punitive damages.

This question is a policy question that states should remain free to resolve. As even petitioners' survey of common law precedent makes clear, the states are in-

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punitive damages. These cases rejected the old common law rule that a plaintiff could not recover punitive damages against any defendant unless it proved an entitlement to such damages against all defendants. The cases thus permitted an award of punitive damages against the only defendant found to have acted in a sufficiently egregious manner to warrant such damages. The cases did not even discuss the issue of apportionment among defendants who have been found liable for punitive damages. Similarly, *Mauk v. Brundage*, 68 Ohio St. 89, 67 N.E. 152 (1903), held only that punitive damages could not be awarded against a defendant who failed to act with the standard of actual malice required by the common law as a prerequisite for any award of punitive damages. And *Freeman v. Sproles*, 204 Va. 353, 131 S.E.2d 410 (1963), held only that an employer could not be held vicariously liable for punitive damages against an employee if the employee was not acting within the scope of his employment. Apportionment was not at issue.

[31] *E.g., St. Louis & South West Ry. Co. of Texas v. Thompson*, 102 Tex. 89, 113 S.W. 144 (1908); *Louisville & Nashville R.R. v. Roth*, 130 Ky. 759, 114 S.W. 264 (1908); *Edquest v. Tripp & Dragstedt Co.*, 93 Mont. 446, 19 P.2d 637 (1933); *Hotel Riviera, Inc. v. Short*, 80 Nev. 505, 396 P.2d 855 (1964); *Johnson v. Atlantic Coast Line R.R. Co.*, 142 S.C. 125, 140 S.E. 443 (1927).

[32] *Thompson v. Catalina*, 205 Cal. 402, 271 P. 891 (1928); *Shields v. Martin*, 109 Idaho 132, 806 P.2d 21 (1985); *Nelson v. Halvorson*, 117 Minn. 255, 135 N.W. 818 (1912); *Embrey v. Holly*, 293, Md. 128, 442 A.2d 966 (1982); *Coty v. Ramsey Associates, Inc.*, 149 Vt. 451, 546 A.2d 196 (1988).

volved in a salutary common-law search for appropriate solutions to the issue of multiple liability for punitive damages. Legislative processes also remain open. Judicial policymaking in the guise of recognizing a "fundamental" substantive due process right to apportionment would not only freeze common law development at this immature stage, but would also throw into doubt numerous areas of settled law. For example, adoption of the principle espoused by petitioners would call into serious question this Court's rulings that in appropriate circumstances even *criminal* liability may be imposed without any showing of fault on the defendant's part. *E.g.*, *United States v. Dotterweich*, 320 U.S. 815 (1943); *United States v. Balint*, 258 U.S. 250 (1922). Petitioners' arguments also call into question the imposition of joint and several liability on antitrust coconspirators for treble damages, which indisputably have a punitive component. Indeed, there is no apparent basis for limiting the due process "right" petitioners seek to create to punitive damages. Such common-law concepts as enterprise liability and strict liability, and such legislative solutions as workers' compensation—all of which further state policy goals by assessing liability irrespective of fault, or the degree of fault—would be seriously undermined by a requirement that sanctions be premised on individual culpability.

Petitioners are therefore forced to rely exclusively on the kinds of amorphous appeals to "fundamental fairness" the Court has repeatedly rejected as a justification to find new substantive rights in the broad procedural guarantees of the Fourteenth Amendment.[33]

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[33] Petitioners' reliance on *Mathews v. Eldridge*, 424 U.S. 319 (1976) is misplaced. The approach adumbrated in *Mathews* is meant to guide resolution of what *procedures* government must afford in connection with the deprivation of protected substantive interests. But petitioners are not claiming a need for additional procedures prior to the imposition of punitive damages. To the contrary, petitioners seek a *substantive* constitutional limitation on

B. This Case Would Be An Exceedingly Inappropriate Vehicle For Considering The Apportionment Question.

Even if the apportionment question were an important question of federal law—and it is not—the present case does not offer an appropriate opportunity for resolving that question. Although petitioner Clardy's decedent and a codefendant were held jointly and severally liable for a punitive damages judgment, petitioner Clardy cannot plausibly claim that her decedent's conduct was insufficiently reprehensible to justify punitive damages or that his conduct was less reprehensible than that of the codefendant. Petitioner Clardy's decedent engaged in a drunken drag race. He drove his vehicle on the wrong side of the double yellow line during that race. And it was his vehicle that crashed into respondent's daughter and killed her. Understandably, given these facts, petitioners have not disputed the Alabama Supreme Court's findings that "the accident was entirely the combined and concurring fault" of petitioner Clardy's decedent and the codefendant. Opinion, Pet. at 3a. Thus, this case does not present the issue of the least or less culpable defendant being assessed damages occasioned largely by the acts of a more culpable defendant. Nor is this a case in which one defendant has been assessed damages occasioned in part by the independent and unforeseeable acts of another defendant.

Because petitioner Clardy's decedent was specifically found to be at fault for the accident, and acted with even greater indifference to human life than did the codefendant[34], the proposed constitutional protection for the least culpable defendant would not benefit petitioner

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state remedial authority to impose punitive damages without a precise calculation of the relative culpability of joint tortfeasors.

[34] The jury found Clardy grossly negligent and the codefendant negligent. Clerk's Record at 168.

Clardy.[35] On this record, therefore, the apportionment question is wholly hypothetical and abstract. This Court "is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 409 (1900); *accord Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74 (1955).

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[35] Nor is there any basis to argue that it would be "fundamentally unfair" not to apportion damages between Eugene Clardy and Clardy Realty, Inc., because, as the Alabama Supreme Court found, "Clardy the individual and Clardy Realty, a sole proprietorship, are but a single legal entity," Opinion, Pet. at 4a, and petitioner "*Clardy* Realty, Inc., became the successor corportion to the interests and liabilities of Clardy Realty, a sole proprietorship." Opinion, Pet. at 11a. Thus, if the Court granted a writ of certiorari on the apportionment issue and reversed, it would be a simple matter for Debby Clardy and Clardy Realty, Inc., which is owned by Debby Clardy, to reimburse the other for its apportioned share. Indeed, petitioners could immediately implement that reapportionment without any intervention from this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD N. BERSOFF
BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

RICHARD JORDAN AND
RANDY MYERS, P.C.
302 Alabama Street
Montgomery, AL 36104
(205) 265-4561

W. SIDNEY FULLER
28 South Court Square
Post Office Drawer 1637
Andalusia, AL 36240
(202) 222-4196
Attorneys for Respondent

October 12, 1989

* Counsel of Record

(3)

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No. 89-440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBBY CLARDY, as Executrix of the Estate of THOMAS EUGENE CLARDY, deceased, and CLARDY REALTY, INC.,
Petitioners,

v.

MARTHA HOFFMAN SANDERS,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF AMICUS CURIAE OF GOLDEN RULE INSURANCE COMPANY IN SUPPORT OF PETITIONERS

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*DARRELL S. RICHEY
Vice President and
General Counsel
Golden Rule Insurance Company
7440 Woodland Drive
Indianapolis, Indiana 46278
(317) 297-4123

**Attorney for Amicus Curiae and Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

In considering whether to grant the petition for certiorari in this case, the Court may be confronted with the assertion by respondent that Alabama and other States have responded adequately to this Court's suggestion that the States should have the opportunity in the first instance to address the characteristics of their respective punitive damage regimes that have, over the past decade, led to the imposition of increasingly frequent, larger and essentially unrestricted and unpredictable punitive damage awards. Amicus curiae will address the following question:

> Whether the enactment of so-called tort "reform" statutes by a number of States since 1986 should dissuade the Court from addressing the serious constitutional deficiencies in the punitive damage systems of most jurisdictions.

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ABA Standards for Criminal Justice, Standard 18-1.1 *Commentary* (2d ed. 1980)	17
J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* (1985)	15,16
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IN THE

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OCTOBER TERM, 1989

No. 89-440

DEBBY CLARDY, as Executrix of the Estate of THOMAS EUGENE CLARDY, deceased, and CLARDY REALTY, INC.,
Petitioners,

v.

MARTHA HOFFMAN SANDERS,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF AMICUS CURIAE OF GOLDEN RULE INSURANCE COMPANY IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

This case concerns the power of the courts, generally through the medium of juries, to impose punitive fines in unpredictable amounts limited only by the passions that may be aroused in a particular case.

Golden Rule Insurance Company began almost a half century ago in the basement of a small town as a small family-owned insurance business. Although Golden Rule has grown because of its ability to meet

the needs of its policy-holders, it is continuously exposed to the threat of unlimited punitive damages in virtually all of the many States, including Alabama, in which it writes insurance. A massive punitive damage award would impose a particularly gross injury on a company the size of Golden Rule. Golden Rule has followed closely this Court's interest in punitive damages and has filed amicus curiae briefs on each of the three previous occasions the Court has seen fit to grant review of cases presenting constitutional objections to punitive damages.[1]

Golden Rule believes that it can provide the Court with a useful perspective on the question it addresses.[2]

STATEMENT OF THE CASE

This case presents the question left for another day in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989): Whether the Due Process Clause of the Fourteenth Amendment acts as a check on unrestrained jury discretion to award punitive damages in the absence of an express statutory limit. Such unconstrained jury discretion resulted in the $2,750,000 punitive damage award imposed against petitioners under an Alabama statute that authorizes the parent of a deceased minor

[1] *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986); *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988); *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

[2] Consent to the filing of this brief has been given by counsel of record for each of the parties; letters reflecting those consents have been sought and will be filed with the Clerk of the Court upon their receipt by Golden Rule.

to act as a private attorney general by bringing an action to punish the wrongdoer. *See* Ala. Code § 6-5-391 (1975). Alabama statutory law and common law place no limit on the amount of punitive damages that may be imposed against a defendant in a wrongful death action. Thus, the punitive damage award in this case is the product of an arbitrary system that typifies in many respects the punitive damage systems presently in place in most jurisdictions in the Nation. Therefore, petitioners' Due Process Clause challenge to the $2,750,000 punitive damage award raises an important issue that is worthy of this Court's review.

This case is a particularly appropriate vehicle for the Court's consideration of the due process challenge to unlimited jury discretion to award punitive damages. In June 1987, the Alabama legislature enacted a number of changes to the the State's punitive damage system which leave unresolved the fundamental defects in that system. The 1987 Alabama legislation, *inter alia*, placed a limit of $250,000 on punitive damage awards in some types of cases,[3] adopted a "clear and convincing" standard of proof,[4] and established that "[o]n appeal, no presumption of correctness shall apply to the amount of punitive damages awarded."[5] These provisions, however, are made expressly inapplicable to wrongful death actions like the case at bar.[6] Moreover, the $250,000 limit on the size of pu-

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[3] Ala. Code § 6-11-21 (Supp. 1988).

[4] Ala. Code § 6-11-20 (Supp. 1988).

[5] Ala. Code § 6-11-24 (Supp. 1988). The legislation also attempts to define several of the types of conduct giving rise to punitive damage liability. *Id.*, § 6-11-20(b). *See infra*, pp. 15-16.

[6] Ala. Code § 6-11-29 (Supp. 1988).

nitive damage awards does not apply to other broad classes of cases involving (1) a pattern or practice of intentional conduct;[7] (2) conduct involving "actual malice"; or (3) libel, slander or defamation.[8] *See* Petition, at 14-15.

The Alabama legislature has therefore recently decided to leave entire classes of defendants exposed to unlimited monetary punishments based upon a subjective evaluation of whether a defendant's conduct constituted a "pattern or practice" or "actual malice." As amicus shall demonstrate below, the Alabama response is similar to the legislative reaction in most States to the burgeoning punitive damage phenomenon.

SUMMARY OF ARGUMENT

Defenders of the punitive damage systems in place in most jurisdictions in this country have attempted to discourage examination by this Court of the constitutional implications of those systems on the ground, *inter alia*, that the legislatures of many States are reforming the more capricious qualities of these systems. For example, in another case presently before the Court, a Nevada beneficiary of a $5,900,000 punitive windfall argues that Nevada's legislature and highest court have responded adequately to this Court's admonitions in cases such as *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988),

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[7] This Court has had experience with the ambiguities latent in permitting punishment for a "pattern" of proscribed activities. *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989).

[8] Ala. Code § 6-11-21 (Supp. 1988).

that the States should themselves act to bring their punitive damage systems under control. *See* Br. of Resp. in Opp., at 18, in *Combined Insurance Co. of America* v. *Ainsworth*, No. 89-282, *pet. for cert. filed*, August 17, 1989. That litigant asserts that since 1986, twenty-one other States have "reformed" the laws respecting their punitive damage systems. *Id.*, n.14.

However, as even a cursory examination of recent state legislative activity in this area of the law reveals, the net effect of this "reform" is to entrench more firmly the very flaws that have been of greatest concern to this Court. Tort "reform" statutes, such as that enacted in Alabama in 1987, are so riddled with exceptions and uncertainty that they are virtually meaningless except as they provide legislative imprimaturs on punitive damage systems that continue to place unbridled power in juries to punish defendants whose views, status or actions may be unpopular in general or in a particular case. And what the legislatures may enact may also be repealed, as illustrated by the recent action of the Montana legislature in repealing its then newly enacted limit on punitive damage awards.

The cosmetology practiced by most of the state legislatures and courts does virtually nothing to address the underlying features of the punitive damage systems that daily threaten to undermine the stability of contracts and fundamental economic relations. This Court should not again postpone an examination of the constitutional defects in the punitive damage systems in Alabama and elsewhere because those defects have not been and are not likely to be cured by the States.

ARGUMENT

A. Introduction

The Court first suggested in 1986 that unlimited, standardless punitive damage systems raise "important" due process questions. *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). Two years later in *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988), the Court declined to decide those questions, in part to avoid prematurely foreclosing "possibly more appropriate resolutions" of these serious issues. *Id.*, at 1651. The Court in *Bankers Life* acknowledged that state legislatures might choose to enact statutory limits and other meaningful controls on punitive damages. *Id.* & n.3.

However, despite the Court's expressions of concern over the lack of legislatively established standards governing the imposition of punitive damages, Alabama, like the vast majority of States, has failed to establish fixed standards that provide fair warning to defendants of the maximum punishment to which they might be subjected for particular misconduct. In most instances juries remain free to impose punitive damages "guided by little more than an admonition to do what they think is best." *Browning-Ferris*, 109 S. Ct., at 2923 (Brennan, J., concurring). In short, juries continue to have "discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state." *Bankers Life*, 108 S. Ct., at 1655 (O'Connor, J., concurring in part).

Since 1986, at least twenty-five States have enacted legislation relating to punitive damages. Only three of those States, however, have placed limits on the

size of such awards in all cases. A few States, like Alabama, have established a maximum punitive fine for some types of cases (usually non-intentional tort cases), but have excluded from such maxima entire classes of cases in which juries frequently impose excessively large punitive damage awards. In these cases it remains that "[punitive] damages are the direct product of the ancient theory of unlimited jury discretion. . . ." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting). Legislation directed more narrowly at other aspects of the punitive damage system has been similarly incomplete and nonresponsive to the due process problems posed by the capriciousness and destructive capacity of a system that allows juries broad latitude both as to whether there shall be a punishment and how much.

The concerns expressed in *Aetna, Bankers Life* and *Browning-Ferris* regarding the important constitutional implications of these systems have largely gone and continue to go unheeded by state legislatures. The need for this Court to intervene is therefore manifest.

B. Post-1986 Punitive Damage Legislation Has Generally Not Included Express Statutory Limits on the Size of Punitive Damage Awards

In most States that permitted the recovery of punitive damages as of 1983, the discretion of juries was not proscribed by legislatively established limits on the amount of punishment that could be imposed. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269-79, 298-99, 314 (1983). Recent state legislation has produced few explicit, fixed limits on this otherwise unlimited jury discretion. Defendants in the over-

whelming number of punitive damage cases remain unprotected from arbitrary, unlimited and excessive punishments.

1. Legislation Applicable to All Punitive Damage Cases

Since 1986, a Virginia $350,000 limit on punitive damage awards in any action "accruing on or after July 1, 1988," Va. Code Ann. § 8.01-38.1 (Supp. 1989), is the only state enactment to establish a fixed dollar amount limit on punitive damage awards in all cases.

Although both Colorado and Kansas recently enacted provisions that establish *post hoc* "limits" on the size of the award, these "limits" do not enable defendants to ascertain *in advance* the amount of punishment to which they might be subjected. The Colorado legislation limits punitive damages to the amount of the compensatory award (or three times that amount if the misconduct continued during the trial). Colo. Rev. Stat. § 13-21-102 (1987). But in Colorado, as in most States, juries have virtually unlimited discretion to determine the amount of compensatory damages to be awarded. *See, e.g., Smith* v. *Hoyer*, 697 P.2d 761, 765 (Colo. App. 1984) ("The amount of actual damages is within the sole province of the jury, and an award will not be disturbed unless it is completely unsupported by the record.").

Similarly, the Kansas statute, Kan. Stat. Ann. § 60-3701(e) (Supp. 1988), prohibits the assessment of punitive damage awards in excess of the lesser of defendant's highest gross annual income during the five-year period preceding the misconduct, or $5,000,000. This statute paints with an extraordinarily broad brush, drawing no distinctions among the many types of conduct that might warrant punitive dam-

ages. Instead, it exposes persons to levels of punishment based upon their financial positions rather than upon the need to achieve adequate retribution and deterrence. Furthermore, if the court finds that the profitability of defendant's misconduct exceeds or will exceed that amount, it may impose punitive damages of 1 $^1/_2$ times the amount of defendant's profit. *Id.*, § 60-3701(f).[9]

2. Legislation Expressly Excluding Certain Types of Cases from Statutory Limits

The $250,000 ceiling on punitive damages enacted by Alabama does not apply to a wide array of cases—wrongful death cases, cases involving a pattern or practice of intentional conduct, cases involving "actual malice," and cases involving defamation, libel or slander. *See* Ala. Code § 6-11-21 & § 6-11-24 (Supp. 1988). In such cases, juries retain discretion to award punitive damages in any amount.

The limits established by Nevada Assembly Bill 307, which became effective on May 30, 1989, are similarly eviscerated by exceptions. That bill provides that punitive damages may not exceed three times the amount of compensatory damages[10] if the amount of

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[9] In 1986, New Hampshire statutorily prohibited the award of punitive damages in all actions "unless otherwise provided by statute." N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988). However, prior to their abolition, "punitive" damages in New Hampshire had been regarded as serving a compensatory, rather than punitive, function. *See* K. Redden, *Punitive Damages* § 5.2(A)(29) (1980).

[10] As in Colorado, Nevada juries have extremely broad discretion to determine the amount of compensatory damages. *See, e.g., Miller* v. *Schnitzer*, 78 Nev. 301, 371 P.2d 824, 828-29 (1962) ("The extent of such damage, by its very nature, falls

compensatory damages is $100,000 or more, or $300,000 if the compensatory damage award is less than $100,000. These limits are expressly inapplicable to two types of tort cases in which punitive damage awards are assessed with perhaps the greatest frequency and in the highest amounts—actions brought against a "manufacturer, distributor or seller of a defective product" and an "insurer who acts in bad faith regarding its obligations to provide insurance coverage." Moreover, like Alabama, Nevada chose to exempt punitive damage awards in defamation actions. Environmental or other "toxic tort" cases are likewise excluded.

Similarly, the Georgia legislature in 1987 passed legislation that fixes a $250,000 limit on the size of punitive damage awards only in some non-intentional tort cases. Ga. Code Ann. § 51-12-5.1(g) (Supp. 1989). But this section expressly codified the common law rule that "[i]n a tort case in which the cause of action arises from *product liability, there shall be no limitation* regarding the *amount* which may be awarded as punitive damages." Ga. Code Ann. § 51-12-5.1(e)(1) (Supp. 1989) (emphasis added).[11] That legislation also exempts cases in which the defendant acted "with

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peculiarly within the province of the trier of fact, in this case, a jury. . . . The core of the matter seems to be that an appellate court will disallow or reduce the award if its judicial conscience is shocked; otherwise it will not.").

[11] This provision allows recovery of only one punitive damage award in the courts of Georgia against a product liability defendant "for any act or omission" even if such conduct gave rise to multiple causes of action. *Id. See also* Mo. Ann. Stat. § 510.263(4) (Vernon Supp. 1989) (allowing defendant to seek "credit" for previously paid awards arising out of same conduct). Nonetheless, the amount of that single award is unlimited.

the specific intent to cause harm. . . . " Ga. Code Ann § 51-12-5.1(f) (Supp. 1989).

Texas preserved the rule of unlimited punitive damages in its 1987 punitive damage legislation in cases involving intentional misconduct. Section 41.007 of the Texas Civil Practice and Remedies Code limits punitive damages to four times the compensatory award, or $200,000, whichever is greater *only* in cases in which gross negligence is the predicate for the punitive damage award. Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1989). In cases in which liability is based on an intentional tort, or "malice,"[12] punitive damages can be awarded in any amount. *Id.*, § 41.008.[13]

3. Legislation Establishing Limits That Can be Avoided by a Showing of Clear and Convincing Evidence

As part of its general "tort reform" legislation, the Florida legislature in 1986 enacted Fla. Stat. Ann. § 768.73 (West Supp. 1989), which, *inter alia*, created

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[12] Tex. Civ. Prac. & Rem. Code Ann. § 41.001 broadly defines the term "malice" to include specific intent to cause injury as well as knowingly dangerous "flagrant disregard for the rights of others. . . . "

[13] A number of States have prohibited altogether the award of punitive damages in certain kinds of cases. *See, e.g.*, Ill. Ann. Stat. ch. 110, ¶ 2-1115 (Smith-Hurd Supp. 1989) (medical malpractice); Or. Rev. Stat. § 18.550 (1987) (actions against "health practitioners"). In addition, several have established a defense to punitive damages in product liability cases if the drug manufacturer complied with requirements of the Food and Drug Administration. *See, e.g*, Tex. Civ. Prac. & Rem. Code Ann. § 81.003 (Vernon Supp. 1989); Or. Rev. Stat. § 30.927 (1987). Connecticut has limited the amount of punitive damages to twice the compensatory damage award in product liability cases. Conn. Gen. Stat. § 52-240(b) (Supp. 1989).

a rebuttable presumption that an award of punitive damages that exceeds three times the amount of the compensatory damage award is "excessive," but did not establish a maximum limit on the size of punitive damage awards. Fla. Stat. Ann. § 768.73(1)(a)-(b) (West Supp. 1989). The jury is not informed of this presumption and the jury's discretion to impose punitive damages in the first instance is therefore not limited or constrained in any way. However, if the jury returns a punitive damage award that exceeds three times the amount of the compensatory damage award, the amount awarded may stand if "the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact." *Id.*, § 768.73(1)(b). This new legislation thus merely shifts and increases the burden of proof on the issue of excessiveness.

Title 23, § 9 (West 1987) of the Oklahoma Statutes Annotated provides that punitive damages may not exceed "the amount of actual damages awarded." However, this "percentage limitation on such damages . . . shall not apply" if "there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed. . . . " Thus, upon a "clear and convincing" showing plaintiffs in Oklahoma may seek and juries may impose punitive damages in virtually any amount.

4. Legislation Removing Express Statutory Limits

In 1987, the State of Montana amended Mont. Code Ann. § 27-1-221 (1987), and reinstated the rule of unlimited punitive damages in all cases, which it had

restricted only two years before to $25,000 or 1% of the defendant's net worth in cases not involving "actual fraud or actual malice."

5. Legislation Requiring That a Portion of the Award Be Paid to the State

Implicitly recognizing that punitive damages are imposed by governments for governmental purposes and are intended to redress public wrongs rather than private injuries, a number of recently enacted statutes require that a portion of punitive damage awards be paid to the State. *Compare Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("Even assuming that a punitive 'fine' should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated."). These statutes, while reducing the amount of a particular private plaintiff's windfall recovery of punitive damages, do nothing at all to constrain the discretion of juries or courts to impose punitive damages.

At least seven States, Colorado, Florida, Georgia, Iowa, Missouri, Oregon, and Utah, now require that some portion of punitive damage awards (usually after deducting costs and attorneys' fees) be paid into a state fund. For example, the Florida statute requires that 60% of each punitive damage award imposed in a personal injury or wrongful death case be paid to the Public Medical Assistance Trust Fund and, in all other cases, to the State's General Reserve Fund. Fla. Stat. Ann. § 768.73(2) (West Supp. 1989). Similarly, in Georgia 75% of any punitive damage award must "be paid into the treasury of the state. . . . " Ga. Code Ann. § 51-12-5.1(e)(2) (Supp. 1989).[14]

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[14] *See also* Colo. Rev. Stat. § 13-21-102(4) (1987) (one-third of

Although these States have chosen to redirect a portion of the substantial sums awarded to punitive damage plaintiffs, these "reforms" exacerbate rather than resolve the troublesome constitutional problems raised by punitive damages. *See, e.g., Browning-Ferris*, 109 S. Ct., at 2914, 2920 n.21 (leaving open the question whether the Excessive Fines Clause of the Eighth Amendment is implicated if the Government shares in an award of damages exacted for purposes of punishment); *id.*, at 2932-33 (O'Connor, J., concurring in part and dissenting in part) ("by relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests . . . that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity") (citing Fla. Stat. § 768.73(2)(b)).

C. The Punitive Damage Systems in Virtually All Jurisdictions Remain Fundamentally Unfair and Violative of the Due Process Clause

Procedural "reforms" in punitive damage systems have also made only inconsequential, minor inroads into the traditional province of juries to award pu-

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all reasonable punitive damages collected "shall be paid to the state general fund"); Iowa Code Ann. § 668A.1(2)(b) (West 1987) (if defendant's conduct was not specifically directed at the plaintiff, 75% of the punitive damage award goes to state civil reparations trust fund); Mo. Ann. Stat. § 537.675 (Vernon 1988) (50% of any final judgment awarding punitive damages deemed "rendered in favor of the state of Missouri"); Or. Rev. Stat. § 18.540 (1987) (50% of punitive damage award "shall be paid to the Criminal Injuries Compensation Account"); Utah Code Ann. § 78-18-1(3) (Supp. 1989) (50% of any amount of punitive damages exceeding $20,000 must be "remitted to the state treasurer for deposit into the General Fund").

nitive damages on an *ad hoc* and subjective basis, and leave completely unresolved the due process issues presented in *Aetna, Bankers Life* and *Browning-Ferris*. For example, several States have altered the rules of pleading with respect to punitive damages. Florida, Idaho, Illinois, Minnesota and North Dakota prohibit the pleading of punitive damages in an original complaint and generally require some sort of showing that there is a reasonable likelihood that the plaintiff will be able to establish a claim for punitive damages.[15] However salutary this change may be, it does not ameliorate the major constitutional problems presented by massive fines that are subjectively administered in unlimited amounts.

The "lack of sufficient standards governing punitive damage awards in Alabama" mentioned in *Aetna* as presenting an important due process issue has not been resolved in Alabama or anywhere else. Only six States—Alabama, Kentucky, Montana, California, New Jersey and Texas—have taken *any* legislative action to limit or attempt to define more precisely the conduct which may give rise to punitive damage liability. *See* J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 21.22 (1985) (section added March 1989). These attempts to define vague, elastic terms such as "malice," "fraud," "recklessness" and "gross negligence" have resulted in standards that remain far from precise. For example, the California legis-

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[15] Fla. Stat. Ann. § 768.72 (West Supp. 1989); Idaho Code § 6-1604(2) (Supp. 1989); Ill. Ann. Stat. ch. 110, ¶ 2-604.1 (Smith-Hurd Supp. 1989); Minn. Stat. Ann. § 549.191 (West 1988); N.D. Cent. Code § 32-03-7 (Supp. 1989). Georgia now requires a specific prayer for punitive damages in the original complaint. Ga. Code Ann. § 51-12-5.1(d)(1) (Supp. 1989).

lature in 1987 amended its statutory standards to require that conduct be "despicable" as well as "malicious" and "oppressive," to support punitive damages. Cal. Civ. Code § 3294(c) (Deering Supp. 1989). The 1987 Alabama legislation redefined the term "malice" to include, *inter alia*, the "intentional doing of a wrongful act without just cause or excuse . . . [u]nder such circumstances that the law will imply an evil intent," and "fraud" as an intentional misrepresentation "which was gross, oppressive or malicious." Ala. Code § 6-11-20(b) (Supp. 1988). But these statutes do little more than add new and highly subjective terms to already vague and subjective standards.

Although "punitive damages are 'quasi-criminal,' . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings." *Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting). Since 1986, no State has legislatively adopted a standard of proof requiring that liability for punitive damages be established "beyond a reasonable doubt." Moreover, although a number of States recently have increased the burden of proof in at least some punitive damage cases from "preponderance of the evidence" to "clear and convincing evidence,"[16] two States, Idaho and New Jersey, have expressly codified the preponderance of the evidence standard in punitive damage cases.[17]

Recent punitive damage legislation in several States[18] requires some form of bifurcated trial in

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[16] *See* J. Ghiardi & J. Kircher, *supra*, § 21.13 (listing ten states); *see also* Nevada Assembly Bill 307 (eff. May 30, 1989).

[17] J. Ghiardi & J. Kircher, *supra*, § 21.13.

[18] *See, e.g.*, Ga. Code Ann. § 51-12-5.1 (Supp. 1989); Nevada

which either the claim for compensatory damages is bifurcated from the punitive damage claim or the jury's determination of punitive damage liability precedes its determination of the amount of the award. However, simply dividing the jury's assigned tasks into separate phases leaves with the jury the power to punish with unbridled authority. It appears that only three States, Connecticut, Kansas and Ohio have placed statutory responsibility for setting the amount of the award solely in the hands of the trial judge once the jury determines liability,[19] and the Connecticut provision is only applicable to product liability cases.

CONCLUSION

In the context of a system of punishment in which "responsible officials had deliberated and then agreed" as to "a range of penalties," *Browning-Ferris*, 109 S. Ct., at 2923 (Brennan, J., concurring), the limited reforms of state punitive damage law documented above might be regarded as noteworthy, if inadequate, efforts to restrain the passions of juries as they perform the function of selecting the appropriate punishment to impose on defendants within such a "range of penalties." In the absence of such considered legislative judgments, however, these so-called "re-

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Assembly Bill 307; Mo. Ann. Stat. § 510.263 (Vernon Supp. 1989); Mont. Code Ann. § 27-1-221 (1987); N.J. Stat. Ann. § 2A:58C-5 (West 1987); Ohio Rev. Code Ann. § 2315.21 (Anderson 1988).

[19] *See* Conn. Gen. Stat. § 52-240(b) (Supp. 1989); Kan. Stat. Ann. § 60-3701(a) (Supp. 1988); Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1988). *Compare ABA Standards for Criminal Justice*, Standard 18-1.1 *Commentary* (2d ed. 1980) (rejecting use of a jury in imposing a punishment in the criminal context).

forms" merely demonstrate that state legislatures are not prepared to address and resolve the much more basic "vagueness and procedural due process problems," *id.*, at 2924 (O'Connor, J., concurring in part), posed by the open-ended, common law punitive damage systems that continue to flourish across the Nation.

October 14, 1989

Respectfully submitted,

*DARRELL S. RICHEY
Vice President and
General Counsel
Golden Rule Insurance
Company
7440 Woodland Drive
Indianapolis, Indiana 46278
(317) 297-4123

**Attorney for Amicus Curiae and Counsel of Record*

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No. 89-440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBBY CLARDY, as Executrix of the Estate of Eugene Clardy, deceased, and CLARDY REALTY, INC.,
Petitioners,

v.

MARTHA HOFFMAN SANDERS,
Respondent.

REPLY MEMORANDUM

Of Counsel:

MICHAEL B. BEERS
BEERS, ANDERSON, JACKSON & SMITH, P.C.
272 Commerce Street
Montgomery, AL 36104

JULIAN P. HARDY
PRITCHARD, MCCALL & JONES
1700 Financial Center
Birmingham, AL 35203

DEBORAH ALLEY SMITH
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

KARON O. BOWDRE
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

Attorneys for Petitioners

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Federal Constitutional Provisions:

Fourteenth Amendment (Due Process Clause) ..... *passim*

REPLY MEMORANDUM

Respondent advances a series of arguments against review of the concededly important questions raised by petitioners. On close analysis, however, respondent's arguments demonstrate that this case is an ideal vehicle for consideration of the questions presented.

1. *The "Sui Generis" Argument.* The principal thrust of respondent's argument is that this case is somehow "sui generis" or "unique." Br. in Opp., at 6-17. The points made by respondent, however, do not justify either these labels or the conclusion respondent draws from them.

At bottom, respondent's argument is that the size of the punitive damage award at issue in this case is the product of such a carefully crafted system of restraints on jury discretion to administer punishment that this award could not possibly violate petitioners' due process rights. This is, of course, little more than an argument on the merits that should appropriately be saved for plenary consideration of this case by the Court.

Respondent's argument, however, is relevant at the certiorari stage in a manner that respondent does not fully appreciate. In this Court's selection of a case as a vehicle to consider the due process implications of punitive damages, the Court would presumably want to consider a judgment that is the end-product of what are arguably the most exacting state-law controls over jury discretion, controls that have been considered and developed by a particular State's highest court and legislature in light of this Court's expressed concerns regarding the punitive damage system. In such a case, the Court would have the opportunity to take the measure of the best efforts of a jurisdiction in which large punitive damage awards have become commonplace and, if those efforts fall short, to articulate for all jurisdictions the additional requirements imposed by due process. This is that case.

Furthermore, a cursory examination of how Alabama's assertedly comprehensive mechanisms for ensuring "fair and reasonable" punitive damage awards, Br. in Opp., at 8, function in practice demonstrates the flaw in respondent's conclusion that this case or the Alabama punitive damage system is "unique." The "searching . . . post-trial review," *id.*, of the award at issue produced two opinions. First, the trial court, purporting to apply a long list of "factors" set out at length by respondent in her brief, at 9, issued a so-called "*Hammond*" order[1] that respondent quotes in a truncated fashion in her Statement of the Case, *id.*, at 3, but then virtually ignores thereafter. The full text of that "*Hammond*" order is set forth in the petition, at 11a-12a and 15a-16a; what follows is the paragraph from that order that respondent deleted from her quote:

> Even though the award of 2.75 million dollars for the Plaintiff is a large sum of money, it is not excessive as a matter of law. The Alabama Supreme Court has recently upheld an award of 3.5 million dollars in a wrongful death action where the combined culpability of the defendants appears to be less than in the instant case. *Blackbelt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1986).

The practice in Alabama, as illustrated by the foregoing quotation, does not differ materially from the practice in other jurisdictions. Trial judges in Alabama do not even seriously entertain motions to overturn punitive damage awards as excessive unless, in their subjective judgment, the "culpability" of the defendants before them "appears" to be "less" than the culpability of a defendant in another case in which the Supreme Court of Alabama has affirmed an even larger punitive damage award. How much "less" is not, of course, evident. What is evident is that all of

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[1] *See Hammond* v. *City of Gadsden*, 493 So. 2d 1374 (Ala. 1986).

the "factors" to which the Alabama trial judges are required to pay lip service under the *Hammond* case are similar to the incantations employed in other jurisdictions. In the final analysis, those incantations have very little, if anything, to do with the ultimate determination of "excessiveness."

This is, however, not the end of it, because respondent asserts that, in Alabama, punitive damage awards are also subject to "searching" appellate review to ensure that punishments are not excessive. The appellate review in this case is typical of both Alabama and other jurisdictions. In considering petitioners' excessiveness arguments, the court below—as it has come to do in most cases before it[2]—quoted verbatim in its opinion the "*Hammond*" order issued by the trial court and, citing several of its prior cases (including *Blackbelt Wood Co. v. Sessions*, *supra*) found "no basis for reversal." Pet. for Cert., at 11a-13a.

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[2] In what has become an unmistakable pattern, the court below disposes of the many claims of excessiveness coming before it by quoting in full the text of the *Hammond* order issued by the trial court and then rubber-stamping that order with virtually no discussion. *See, e.g., United American Ins. Co.* v. *Brumley*, 542 So. 2d 1231, 1237 (Ala. 1989); *Alabama Power Co.* v. *Capps*, 519 So. 2d 1328, 1329 (Ala.), *app. dism'd*, 108 S. Ct. 1723 (1988); *Carnival Cruise Lines, Inc.* v. *Goodin*, 535 So. 2d 98, 104 (Ala. 1988); *City Bank of Alabama* v. *Eskridge*, 521 So. 2d 931, 933 (Ala. 1988); *Consolidated Freightways* v. *Pacheco-Rivera*, 524 So. 2d 346, 351 (Ala. 1988); *Fruehauf Corp.* v. *Welch*, 519 So. 2d 502, 506 (Ala. 1988); *Harley Davidson, Inc.* v. *Toomey*, 521 So. 2d 971, 975 (Ala. 1988); *L.W. Johnson & Associates* v. *Rivers Construction Co.*, 532 So. 2d 618, 625 (Ala. 1988); *Waterworks and Sewer Board of City of Ardmore* v. *Wales*, 533 So. 2d 212, 215 (Ala. 1988); *Best Plant Food Products* v. *Cagle*, 510 So. 2d 229, 232 (Ala. 1987); *Ensor* v. *Wilson*, 519 So. 2d 1244, 1274 (Ala. 1987); *Harmon* v. *Motors Insurance Corp.*, 525 So. 2d 411 (Ala. 1987); *Hayes* v. *Payne*, 523 So. 2d 333, 336 (Ala. 1987); *John Hancock Variable Life Insurance Co.* v. *Pierce*, 530 So. 2d 719, 725 (Ala. 1987); *Kabel* v. *Brady*, 519 So. 2d 912, 920 (Ala. 1987); *State Farm Fire and Casualty Ins. Co.* v. *Lynn*, 516 So. 2d 1373, 1380 (Ala. 1987); *Blackbelt Wood Co.* v. *Sessions*, 514 So. 2d 1249, 1265 (Ala. 1986).

Thus, the "searching" appellate review of punitive damage awards in Alabama involves a circular inquiry in which the trial courts look to the punishments the Supreme Court of Alabama has been willing to affirm, while the latter court defers to the judgment of the trial courts and its own prior precedents—including cases pre-dating *Hammond*—in which that court has affirmed large punitive damage awards in cases involving conduct that often bears no resemblance to the conduct at issue in the case before it.[3]

It may be that this Court would hold, after full briefing and argument, that the summary application by the Alabama courts of the elastic "standards" promulgated by the court below in the *Hammond* case provides all of the protections from excessive punishments that are due to defendants in civil punitive damage actions. Such a holding might well validate the punitive damage regimes in other jurisdictions. It may also be, however, that the Court would determine that the Due Process Clause requires more, that courts and juries alike must render their inevitably subjective judgments within a framework of legislatively established ranges of punishment. The Court might also decide that even if no maximum punishment must be established in advance, due process forbids punishment out of proportion to the punishments prescribed by the legislature for similar conduct. These are, however, the merits

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[3] For example, in ratifying the trial court's *Hammond* order in the case at bar, the court below cited, *inter alia*, *American Pioneer Life Ins. Co.* v. *Sandlin*, 470 So. 2d 657 (Ala. 1985), and *National Security Fire & Casualty Co.* v. *Bowen*, 447 So. 2d 133 (Ala. 1983). *Sandlin* involved the affirmance of a $3,000,000 punitive damage award in an insurance fraud case; *Bowen* involved the affirmance of a $1,500,000 punitive damage award against an insurance company on claims of malicious prosecution and outrageous conduct. The apparent message being sent by the court below by its citation to these two cases is that because it has affirmed such large awards in these types of cases, there is virtually no punishment it would not sanction in a wrongful death case.

of the questions presented by this petition, and there is simply no credible argument that these questions are either insubstantial or that this case does not present them clearly and in a setting that is entirely appropriate for their resolution.

Respondent also argues that this case is "sui generis" because in the absence of a compensatory award, there is no basis for measuring the disproportionality between the punishment meted out by the Alabama courts and the actual injury inflicted by Mr. Clardy. Alabama, of course, had the right to fashion an action for wrongful death in which compensation for economic losses is not provided. That Alabama has chosen to do so, however, can hardly serve as a basis for freeing its wrongful death actions from the constraints of the Constitution. If, as respondent suggests, the gross disproportionality between the compensatory and punitive damage awards in a particular case raises a serious due process concern, it would appear to be *a fortiori* that the imposition of a large punitive damage award in the total absence of any ascertained compensatory damages would be of even greater concern under the Due Process Clause.

Furthermore, respondent's argument assumes what respondent herself denies, Br. in Opp., at 16 n.17—that the relationship between the compensatory and punitive awards in a particular case should be regarded as an appropriate test of the constitutionality of a punitive award. In any event, if the Court were to fashion such a test, its application to this case would presumably require Alabama to refashion its wrongful death actions to provide for some calculation of actual injury, whether or not recoverable, in each case. The rule itself could be applied to all punitive damage cases, including this case after appropriate proceedings on remand.

2. *The "Impossibility" Argument.* In an attempt to convince the Court that review of this case would be futile

because there is assertedly no workable constitutional rule that could be fashioned to deal with petitioners' complaint, respondent contends that "it would be impossible for a legislature to devise standards that would specify an individually appropriate punishment for every conceivable case in which punitive damages could be awarded." Br. in Opp., at 12. Respondent's argument is a red herring for several reasons.

First, respondent's argument assumes that petitioners espouse a rule under which legislatures would be required to enact limits on punitive damage awards that are "individually appropriate . . . for every conceivable case . . . ." That is not, however, petitioners' position. Rather, petitioners believe that due process requires that a clearly articulated range of potential punishments be established in advance for the various types of conduct for which punitive damages may be imposed.[4] As respondent herself points out, the Alabama legislature has enacted a number of statutes with legislatively established ranges of punishment under which the conduct of Mr. Clardy—had he lived—and Mr. Kervin could have been evaluated by the State of Alabama. Br. in Opp., at 17 n.19. As these statutes demonstrate, the Alabama legislature is capable of performing this classic legislative function. The threshold problem in the case at bar is that the Alabama legislature, like most other legislatures, has abdicated this area of

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[4] As respondent correctly observes, Br. in Opp., at 18-19 n.24, this Court has recognized the distinction between standardless jury discretion to punish and "the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment *within legally prescribed limits.*" *Giaccio v. Pennsylvania*, 382 U.S. 399, 405 n.8 (1966) (emphasis added). What respondent fails to acknowledge is that there were and are no ascertainable, "legally prescribed limits" on the amount of punishment that could be inflicted on petitioners in this case or the punishments that may be inflicted on the vast majority of other defendants exposed to punitive damage awards in Alabama and other jurisdictions.

legislative decisionmaking to the *ad hoc* decisionmaking of juries and judges.

Second, the problem alluded to by respondent—how precise must state legislatures be in establishing ranges of punishment for particular types of conduct—is not raised directly by this case. Alabama's recent legislative decision to place no limit on punitive damages in this and other classes of cases renders this case representative of the punitive damage systems in force in most States in which the recent flurry of legislative activity has produced but a single, unqualified limit on punitive damages.[5]

Third, respondent's argument does not recognize that this Court could well announce a constitutional rule in this case under which punitive damage awards could not exceed or be disproportional to punishments already prescribed by the Alabama legislature for similar conduct. Indeed, it is noteworthy that the sum of the monetary punishments that could have been imposed on Mr. Clardy upon his conviction for every one of the offenses respondent views as applicable to his conduct in footnote 19 of her brief is $33,100.[6] The punishment imposed by the Alabama courts without observance of the many procedural rights that would have been enjoyed by Mr. Clardy in those judicial proceedings is more than 83 times the aggregate monetary punishment expressly prescribed by the Alabama legislature for that conduct.

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[5] As *amicus curiae* Golden Rule Insurance Company documents in its brief filed in this Court in support of petitioners, only one jurisdiction in this country—Virginia—has established a maximum, ascertainable dollar limit on the amount of punitive damages that may be imposed in all cases in which punitive damages are available. *See* Br. Amicus Curiae of Golden Rule Insurance Company, at 8-9.

[6] A chart detailing the punishments available under the Alabama statutes cited by respondent is contained in the Appendix, *infra*. The $33,100 figure given in the text above assumes that Mr. Clardy would have been a first-time offender.

3. *Joint Liability for Punitive Damages.* Respondent does not suggest what rational state policy might be served by placing, as do Alabama and seven other States, complete discretion in successful punitive damage plaintiffs to enforce their punitive judgments against any one of multiple defendants. Respondent instead argues that this is simply an area of the law that should be left to the States which are, the Court is told, "involved in a salutary common-law search for appropriate solutions to the issue of multiple liability for punitive damages." Br. in Opp., at 24-25. But respondent offers no evidence—nor could she—that Alabama or any of the other States subscribing to this irrational "policy" are likely to bring themselves into conformity with the practice in at least ten other States in which apportionment of punitive damages is the rule.[7] As petitioners demonstrate in the petition, at 22, the court below has expressly acknowledged that its prior cases upholding joint liability may have been "incorrectly decided," but that court has simply "resolutely refused" to change the Alabama rule. *Tatum* v. *Schering Corp.*, 523 So. 2d 1042, 1043 (Ala. 1988). That attitude disposes of

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[7] Respondent purports to draw a distinction between States in which cases "permit" apportionment and States in which apportionment is "required." Br. in Opp., at 24. What relevance such a distinction might have is obscure; the actual practice in the States is the relevant consideration, not the precise choice of words by which the pertinent state courts adopted that practice.

Respondent also mischaracterizes, Br. in Opp., at 23 n.30, the *ratio decidendi* of cases such as *Rubi* v. *Transamerica Title Ins. Co.*, 131 Ariz. 403, 641 P.2d 891, 893 (Ct. App. 1981), in which the appellate court affirmed the decision of the trial court that the codefendant employer of the defendant upon whom punitive damages had been imposed should not also have punitive damages imposed upon it because no punishment was warranted—even though the employer was jointly and severally liable for the compensatory part of the verdict. *Rubi* squarely supports the rationale that petitioners ask this Court to adopt as a constitutional imperative.

respondent's defense of the alleged "salutary search for . . . solutions" to this palpably unjust practice.

Respondent also argues that this case is not an appropriate vehicle for the Court's consideration of this question because Mr. Clardy's widow is not in a position, according to respondent, to argue that her husband's conduct was "less culpable" than that of James Kervin. That *factual* contention is, however, not established by the record in this case because Alabama law does not permit the apportionment of liability for punitive damages and therefore does not authorize the jury to ascertain relative culpability among several defendants.[8]

Furthermore, petitioners' contention is not, as respondent assumes, based solely upon the notion of relative culpability. Regardless of the *degrees* of culpability of the individual defendants, the failure to apportion a punitive damage award levied against multiple defendants unavoidably results in the arbitrary punishment of one defendant for the misconduct of another. By respondent's own assertions, James Kervin was one of two "drunken defendants" who himself had received five speeding tickets during the two years preceding the accident. Br. in Opp., at 1 & 2 n.2. By respondent's own statement, punitive damages "should be individually tailored to the circumstances of each case . . . ." *Id.*, at 12. Yet on September 22, 1989, respondent sent a letter to petitioners demanding

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[8] Respondent twice asserts that the jury "found" that Mr. Clardy "was more culpable" than James Kervin, Br. in Opp., at 5 & 26. Indeed, respondent goes so far as to assert that the "jury found Clardy grossly negligent and the codefendant [James Kervin] negligent." Br. in Opp., at 26 n.34. Respondent apparently bases this assertion on the notations by the jury on the verdict form in which the word "(GROSS)" appeared after the name of petitioner Clardy while the word ("simple)" appeared after the name of James Kervin. However, the jury was never instructed to determine the relative culpability of any of the defendants or how it might go about doing so, and these notations have not otherwise been explained.

payment of the entire judgment, including interest.[9] That payment would have been required but for the stays granted to petitioners first by Justice Stevens and then by the Court. Mr. Clardy could never be punished or deterred because he died almost instantly in the accident. Even if it were rational to punish Mr. Clardy's innocent estate by imposing some portion of a punitive damage award on it, placing the power to decide, as respondent has done, that James Kervin shall never be punished or deterred by having to pay any portion of the $2,750,000 punitive fine advances no discernible state purpose and unjustifiably punishes petitioners for the acts of Mr. Kervin.

4. *Conclusion.* The record in this case presents the questions tendered by petitioners as fully and as clearly as any case likely to come before the Court. The Alabama courts and legislature have recently determined to preserve and perpetuate that State's arbitrary and capricious punitive damage system in most of its particulars notwithstanding this Court's expressed concerns that originated over three years ago in another Alabama case, *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986). Certiorari should be granted and this case set for plenary consideration.

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[9] A copy of that letter was lodged by petitioners with the Clerk of this Court on September 25, 1989, in connection with petitioners' stay application.

October 18, 1989

Respectfully submitted,

Of Counsel:

MICHAEL B. BEERS
BEERS, ANDERSON, JACKSON
& SMITH, P.C.
272 Commerce Street
Montgomery, AL 36104

JULIAN P. HARDY
PRITCHARD, MCCALL & JONES
1700 Financial Center
Birmingham, AL 35203

DEBORAH ALLEY SMITH
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

KARON O. BOWDRE
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

Attorneys for Petitioners

**Counsel of Record*

APPENDIX

APPENDIX

FINES AND IMPRISONMENT FOR SPECIFIC VIOLATIONS OF THE ALABAMA CODE

Code §	Offense	Imprisonment	Fine
13A-6-2(A)	Murder	Life, or 10-99 years	NTE $20,000
	Class A Felony with lethal weapon	20-99 years	
	habitual/repeat offender	15-20 years	
13A-6-(3)	Manslaughter	2-20 years	NTE $10,000
	Class B Felony with lethal weapon	10-20 years	
	habitual/repeat offender	see Class A Felony	
13A-6-5	Negligent homicide Class A Misdemeanor	NTE 1 year	NTE $1,000
32-5A-190	Reckless driving	5-90 days	$25-$500
	2nd conviction	10 days-6 mos.	$50-$500
32-5A-84	Overtaking on left (misdemeanor)	1st offense: NTE 10 days	NTE $100
		2nd/1yr.: 30 days	$200
		3rd/1yr.: 3 mos.	$500 or both
32-5A-191	DUI	1st offense: NTE 1 year	$250-$1,000
		2nd/5yrs.: NTE 1yr (and fine)	$500-$2,500
		3d/5yrs.: 60 days-1 yr. (60 days (mandatory) and hard labor and fine)	$1,000-$5,000
32-5A-178	Drag-racing	1st offense: 5-90 days	$25-$500
		2nd/1yr.: 10 days to 6 mos.	$50-$500